No. 16102

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 839, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

APPELLANTS' OPENING BRIEF

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United States Court of Appeals

For the Ninth Circuit

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, *Appellants,* vs. Morrison-Knudsen Company, Inc., a corporation, *Appellee.*	No. 16102

Appeal from the United States District Court for the Eastern District of Washington Southern Division

APPELLANTS' OPENING BRIEF

JURISDICTION

Morrison-Knudsen Company, Inc., appellee, is a large contracting firm with headquarters at Boise, Idaho. On November 25, 1955, it entered into a contract with the United States Atomic Energy Commission for the construction of extensive facilities at the Hanford Atomic Products Operation and commenced the performance of the work on November 28, 1955. In the prosecution of that work it employed members of the two appellant unions, namely, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 839 and International Union of Operating Engineers Local 370 (hereinafter in this

brief called Teamsters Local 839 and Operating Engineers Local 370).

In February, 1955, prior to the commencement of the work the appellee had become a member of Associated General Contractors of America, Inc., Spokane Chapter. On December 19, 1955, a labor contract was entered into between Associated General Contractors and Teamsters Local 839. On December 24, 1955, a labor contract was entered into between Associated General Contractors and Operating Engineers Local 370. These contracts both took effect as of January 1, 1956. On March 22, 1956, a work stoppage occurred and continued until June 6, 1956. Claiming that this work stoppage constituted a strike in violation of certain provisions of these two labor contracts, appellee brought this action for damages.

The appellee invoked jurisdiction of the District Court solely under Section 301 of the Labor Management Relations Act of 1947, otherwise known as 29 U.S.C.A., Section 185, which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

A judgment awarding appellee damages in the sum of $147,284.41 with interest and costs originally entered on April 14, 1958 (Tr. 144-148) was amended by

an order entered on May 8, 1958 (Tr. 171-174). An appeal to this court from that judgment was taken on May 12, 1958 (Tr. 174-176). The appellate jurisdiction derives from 28 U.S.C.A., Section 1291, which provides that

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

PROCEEDINGS BEFORE TRIAL

In its original complaint filed on May 8, 1956 (Tr. 3-12), while the work stoppage was still existing, the appellee named five defendants, namely:

1) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 839
2) Joint Council of Teamsters No. 28
3) Western Conference of Teamsters
4) International Union of Operating Engineers, Local No. 370, and
5) International Union of Operating Engineers, A.F.L.

Later and after the work stoppage had ceased the appellee filed an amended complaint (Tr. 12-20), seeking damages in the sum of $248,127.00 which it claimed had been sustained while the work stoppage continued from March 22, 1956, until June 6, 1956. In this complaint the International Union of Operating Engineers A.F.L. was not named as a defendant. Still later and at an early stage of the trial Joint Council of Teamsters No. 28 and Western Conference of Teamsters were dismissed (Stipulation Tr. 121-122). No appeal has been

taken from the dismissal of those two defendants, and hence the case now stands in this court as if it had been brought by the appellee as plaintiff against Teamsters Local 839 and Operating Engineers Local 370 only.

The case was tried on the issues made by the amended complaint (Tr. 12-20); the separate answer of Teamsters Local 839 (Tr. 21-26); the separate answer of Operating Engineers Local 370 (Tr. 26-31) and appellee's replies to each of those answers (Tr. 31-33 and Tr. 33-34).

Three exhibits were attached to the original complaint identified as A, B and C. By reference these exhibits were made a part of the amended complaint and on the trial became Exhibits 2, 3 and 50. They will be so referred to throughout this brief.

Exhibit 2 is a contract dated December 19, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and five Teamster locals, including the appellant Teamsters Local 839.

Exhibit 3 is a contract dated December 24, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and the appellant, Operating Engineers Local 370.

Exhibit 50 is a letter dated April 27, 1956, from appellee's attorneys to the two local unions.

The amended complaint alleged the corporate existence of the plaintiff-appellee, that it was engaged in an industry affecting commerce as defined by the Labor Management Relations Act of 1947; the existence of the two local unions as labor organizations, and that the

action was brought and was being prosecuted under the provisions of Section 301 of that Act—29 U.S.C.A., Section 185 (Tr. 14).

The amended complaint then alleged that on November 25, 1955, the appellee entered into a contract with the United States Atomic Energy Commission for the construction of certain facilities at the Hanford Atomic Products Operation, and on November 28, 1955, it commenced the performance of the work, employing members of Teamsters Local 839 and Operating Engineers Local 370; that the appellee was a member of Associated General Contractors of America, Inc., Spokane Chapter; alleged the execution of the two labor contracts (now Exhibits 2 and 3), quoting certain provisions of those contracts to which reference will be made later.

The amended complaint then alleged that the two local unions violated the contracts by demanding "isolation pay" of $2.62 per day for their members and by demanding free transportation for their members from the North Richland bus terminal to the work site, which demands were refused by the appellee. It then alleged that upon the refusal of the appellee to accede to what it claimed to be illegal demands the job was picketed and a strike occurred, causing damage to the appellee in the sum of $248,127.00.

The answer of Teamsters Local 839 (Tr. 21-26), after making admissions relative to the corporate existence of the appellee and its own existence as a labor union, admitted that the appellee was attempting to prosecute the action under the provisions of Section 301 of the

Labor Management Relations Act of 1947, 29 U.S.C.A., Section 185, but denied that the appellee had any cause of action by reason of any of the matters alleged in its amended complaint. It admitted that the appellee had been performing construction work for the United States Atomic Energy Commission within the Hanford Atomic Products Operation and employed members of Teamsters Local 839. It admitted that that area is in part within the exterior limits of Benton County, Washington, but denied that the said area for the purposes of its labor contract is a part of Benton County. It admitted the execution of the contract of December 19, 1955 (now Exhibit 2). It denied any breach of said contract and denied that the appellee had been damaged as claimed.

This appellant then affirmatively alleged (Tr. 24) and the appellee by its reply admitted (Tr. 32), that the contract between the appellee and the United States Atomic Energy Commission related to and was limited to construction work to be performed wholly within an area located within the exterior limits of Benton County, Washington, and the adjoining Counties of Franklin, Yakima and Grant acquired by the Federal government with the consent of the State of Washington for purposes of national defense and so used by the Federal government and its agencies for purposes designated in Atomic Energy Act of 1946. The answer further alleged that the area within which the appellee was performing work for the Atomic Energy Commission, although in part within the exterior limits of Benton County (Tr. 25), had always been regarded by labor unions and by contractors as segregated from the re-

mainder of Benton County for the purpose of negotiating labor agreements and was so regarded when the labor agreements in question were being negotiated. It was then alleged that for many years prior to and during the year 1955 all contractors contracting with United States Atomic Energy Commission for the performance of construction work within said area had negotiated their labor agreements with labor unions, including Local 839, through a bargaining representative known as "Hanford Contractors Negotiating Committee," and all of such contractors who at the same time were engaged in performing construction work in Benton County and adjoining counties but not within said area negotiated their labor agreements with labor organizations, including Local 839, through another and different bargaining representative known as "Associated General Contractors of America, Inc., Spokane Chapter." It was then alleged (Tr. 25) that the labor contract of December 19, 1955 (Exhibit 2) did not apply and was not intended to apply to construction work to be performed by appellee for the Atomic Energy Commission under the contract described in paragraph IV of the amended complaint. These latter allegations of the affirmative defense were denied by appellee's reply (Tr. 34).

The answer filed by Operating Engineers Local 370 to the appellee's amended complaint (Tr. 26-31) made similar admissions and denials as were made in the answer of Teamsters Local 839 and the reply of the appellee to the answer of Operating Engineers Local 370 made similar admissions and denials (Tr. 31).

Article II of the Teamsters contract (Exhibit 2) entitled "Territory and Work Covered" reads:

> "Section 1. This Agreement shall cover all Heavy, Highway and Engineering construction work in the following counties or parts of counties East of the 120th Meridian: Grant, Ferry, Stevens, Pend Oreille, Chelan, Lincoln, Spokane, Adams, Whitman, BENTON, Okanogan, Douglas, Kittitas and Yakima in the State of Washington; * * * " (Exhibit 2, page 4)

The same description of "territory and work covered" appears in the contract of Operating Engineers Local 370 (Exhibit 3, Article II, page 4).

Article IX of the Teamsters contract (Exhibit 2) entitled "Settlement of Disputes and Grievances" reads:

> "Section 1. If a dispute involving the application or interpretation of the Agreement shall arise (other than jurisdictional disputes) written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either Contractor or the affected Union) to the other. If the two (2) parties are unable to adjust the same within forty-eight (48) hours, the dispute shall be settled by the following procedure: * * *. (Exhibit 2, page 11)

A similar provision is included in the contract of Operating Engineers Local 370 (Exhibit 3, Article X, page 9).

The claim of the appellee is that the work it undertook to perform for the Atomic Energy Commission was being performed "in Benton County, Washington." The appellants insist that after its acquisition by

the Federal government the area in which the work was to be performed was no longer a part of Benton County.

After the case was at issue the appellee filed a bill of particulars detailing the damages claimed amounting to $248,127.00 (Tr. 35-36), and later filed an amended statement of damages claimed amounting to $238,180.93 (Tr. 37-48).

The case was originally filed in the Southern Division of the Eastern District of Washington. With the approval of the trial court, it was stipulated that it would be transferred for trial from Yakima to Spokane and should first be assigned for hearing to determine the question of liability only, and if liability should be found in favor of the appellee the trial would be continued and assigned for hearing at a later date for the determination of damages (Tr. 51-52).

Prior to trial the appellants made requests for admissions under Rule 36 (Tr. 53-58), which were answered by appellee (Tr. 58-62), and later the appellants made supplemental requests for admissions (Tr. 62-63), which were likewise answered (Tr. 64-65). These requests and answers relate to proceedings in the United States District Court for the Eastern District of Washington pursuant to which the Federal government by condemnation acquired the area in question for the establishment of a military reservation while the war between the United States and Japan was being waged.

TRIAL OF ISSUE OF LIABILITY

The hearing to determine liability began on June 10,

1957. The evidence on that issue appears in the Transcript of Record, Volume 1, page 179, to Volume 3, page 785.

At the commencement of this hearing counsel for the appellee moved to strike the affirmative defenses as pleaded in the appellants' answers, the sole ground of the motion being that to receive evidence in support of those defenses would violate the Parol Evidence Rule (Tr. Vol. 1, pp. 182-184). That motion was granted for that reason alone (Tr. Vol. 1, p. 190).

After the court, on appellee's motion, had stricken the appellants' affirmative defenses as pleaded in their answers, and later during the course of the liability hearing the appellants amended their answers to affirmatively plead that:

> "On November 25th, 1955, the plaintiff entered into a contract with the United States Atomic Energy Commission for the construction of certain facilities wholly within the limits of the said area above described acquired by the United States for purposes of national defense, and on or about November 28th, 1955, it commenced the performance of said work. To perform the work it had to do under said contract, it became necessary that plaintiff employ members of said local unions 839 and 370. For many years prior to the commencement of that work, there had been in full force and effect a certain labor contract negotiated by said Hanford Contractors Negotiating Committee defining the terms and conditions applicable to work within said area, including provisions that the workmen, in addition to stipulated hourly wages, should be paid an additional amount known as 'isolation pay' and should also be furnished bus

transportation to and from their particular places of employment within the Hanford area.

"At the time of the commencement of the work, plaintiff agreed with defendant locals 839 and 370 that said Hanford contract should apply to said job until completed and, although termination notice of said contract was made on December 29th, the terms of said contract were applied until after March 20, 1956.

"Beginning about March 8, 1956, the plaintiff sought to apply to said work the provisions of certain other contracts, namely, Exhibits A and B attached to the plaintiff's original complaint, both less favorable to defendants' members; that on or about March 22nd, 1956, the plaintiff definitely refused to abide by commitments and the work stoppage described in the amended complaint occurred and continued until June 6, 1956, when work under the original conditions, including 'isolation pay' and free bus transportation, was resumed.

"The loss, if any, sustained by plaintiff was caused solely by its said refusal to abide by its commitments relating to the payment of 'isolation pay' and the furnishing of bus transportation." (Tr. Vol. 2, pp. 446-447)

Twenty exhibits were introduced during the liability hearing. These are listed in Appendix 1 in the order of their introduction and, to the extent deemed necessary, will be referred to later.

The witnesses examined orally on behalf of the appellee in opening its case were:

Lee J. Knack, Labor Relations Director of the appellee (Tr. Vol. 1, pp. 192-313).

Sam C. Guess, Executive Secretary of Spokane Chapter of the Associated General Contractors (Tr. Vol. 1, p. 313, to Vol. 2, p. 401).

Ramon E. Reed, appellee's Project Manager in charge of the performance of its contract with the Atomic Energy Commission (Tr. Vol. 1, pp. 401-422).

Arthur A. Rossman, Business Manager of Operating Engineers Local 370, called as an adverse witness (Tr. Vol. 1, pp. 422-438) and later recalled (Tr. Vol. 2, pp. 681-695).

The defense witnesses were:

Charles J. Knapp, Secretary of Pasco-Kennewick Building Trades Council, with which the two appellant local unions were affiliated, and also Secretary-Treasurer of the Local Cement Finishers Union (Tr. Vol. 2, pp. 469-551).

William H. Dunn, Field Representative of Operating Engineers Local 370 (Tr. Vol. 2, pp. 522-595).

Arthur A. Rossman, Business Manager of Operating Engineers Local 370 (Tr. Vol. 2, pp. 596-654).

Robert M. Lewis, Secretary-Treasurer of Teamsters Local 839 (Tr. Vol. 2, pp. 654-668).

Harold Edward Clary, Business Representative of Painters Local Union 427, affiliated with Pasco-Kennewick Building Trades Council (Tr. Vol. 2, pp. 669-672).

Lawrence R. King, Business Representative of Millwrights and Machinery Erectors Local Union 1699, affiliated with Pasco-Kennewick Building Trades Council (Tr. Vol. 2, pp. 672-680).

Sewell Davis, who was Secretary-Treasurer of Teamsters Local 839 in the latter part of 1955 and the early part of 1956 and who represented his union during that period of negotiations, died before the trial commenced in June, 1957, and for that reason his evidence was not available (Tr. 654-655).

As rebuttal witnesses appellee examined:

Lee J. Knack, appellee's Labor Relations Director (Tr. Vol. 2, pp. 700-724).

Kenneth M. McCaffree, who was Executive Secretary of Hanford Contractors Negotiating Committee from March, 1953, until October, 1954 (Tr. Vol. 2, pp. 725-759).

Francis H. Bacon, Deputy Director of Organization and Personnel for Atomic Energy Commission at its Hanford Works (Tr. Vol. 2, p. 759, to Vol 3., p. 780).

After the conclusion of the liability hearing and before the damage hearing began the appellee submitted proposed findings of fact and conclusions of law on the liability issue, which were adopted by the trial court (Tr. Vol. 1, pp. 123-140).

TRIAL OF DAMAGE ISSUE, ENTRY OF JUDGMENT, ETC.

After the court had entered the liability findings on July 24, 1957 (Tr. 123-140) the case was not reached for further trial to ascertain damages until the following February 24, 1958. In the meantime accountants chosen by the appellants had examined appellee's books with the result that when the damage hearing was held appellee reduced its claim from $248,127.00, as stated in

its amended complaint, to $182,515.77, as appears on its Exhibit 49. During this hearing thirty-six exhibits listed in Appendix V, were introduced. The evidence taken on this hearing appears in the Transcript of Record, Volume 3, pages 785-1158. Findings on damage were entered on April 14, 1958 (Tr. 140-143) and on the same day judgment was entered against Teamsters Local 839 and Operating Engineers Local 370, *jointly and severally,* for $147,284.41, together with interest and costs (Tr. 144-148).

While not required to do so as a condition to appeal, appellants elected to request findings (Tr. 149-168) as Rule 52(b), Rules of Civil Procedure, provides may be done, and also moved to amend the judgment (Tr. 170) by eliminating the provision holding the appellants liable *jointly and severally* for the amount of damages found.

The findings requested by the appellants related primarily to the liability question and especially to the status of the Hanford Atomic Energy Project as a military reservation. Though these requested findings were based upon admitted facts of record, the court refused to make any of them only because

> *"They are intended to and would provide the factual basis for the legal conclusion that the plaintiff is not entitled to recover against the said defendants, and would necessitate the entry of a judgment dismissing the action."* (Tr. 169)

With that statement we do not disagree.

An order purporting to amend the judgment of April 14, 1958, was entered on May 8, 1958 (Tr. 171-174) and this appeal was promptly taken (Tr. 174-178).

APPELLANTS' POINTS ON APPEAL AND SPECIFICATIONS OF ERROR

I.

The contract between Morrison-Knudsen Company, appellee, and Atomic Energy Commission dated November 25, 1955, was to be performed wholly within the limits of Hanford Atomic Energy Project (Hanford area), a Federal enclave or reserve acquired and used by the Federal Government for purposes of national defense and incidental activities. That area, as a matter of law, is not part of the territory described in the two labor contracts for the alleged breaches of which appellee is claiming damages (Tr. 1155).

II.

In the alternative, if Point I is not sustained as stated, then the trial court was in error in striking appellants' affirmative defense (Tr. 182-183) and in denying appellants' claim that as a matter of fact when negotiating said labor contracts the parties did not intend to include the Hanford area as part of the territory covered by the labor contracts, because the term "Benton County" as used was intended to mean only that part of Benton County that remained after the Federal Government had severed the lands constituting the Federal reserve from Benton County as it existed prior to the Federal acquisition (Tr. 1156).

III.

The trial court was in error in holding that the appellee had proved a breach of either of the labor con-

tracts involved, but should have held that there was a complete failure of proof because:

(a) Morrison-Knudsen Company, appellee, is not a party to either of the labor contracts involved (Tr. 200).

(b) Morrison-Knudsen Company, appellee, itself precipitated the work stoppage or strike which it claims resulted in damages to it by summarily refusing to pay isolation pay and furnish bus transportation in violation of its commitment to both the Atomic Energy Commission and the unions to continue the conditions prevailing when on November 28, 1955, it commenced the performance of its contract with the Atomic Energy Commission.

(c) If Morrison-Knudsen Company, appellee, is a party to the two labor contracts which it now claims became applicable to its work in the Hanford area, nevertheless, it wholly failed to comply with the provisions of those contracts by making written demand for arbitration when the dispute arose respecting its commitment to continue to pay isolation pay and to furnish bus transportation (Tr. 1156-1157).

IV.

Morrison-Knudsen Company, appellee, failed to prove any joint and several liability in the amount of $147,284.41, or in any amount. The evidence fails to establish what amount, if any, is properly chargeable to Teamsters Local 839 and what amount, if any, is properly chargeable to Engineers Local 370. The failure to make such proof is fatal to appellee's case, because Teamsters Local 839 was not a party to the con-

tract between Associated General Contractors and Operating Engineers Local 370 and, likewise, Operating Engineers Local 370 was not a party to the contract between Associated General Contractors and Teamsters Local 839 (Tr. 1157).

V.

Assuming, but not admitting, that Morrison-Knudsen Company, appellee, did prove its right to recover damages in some amount against one or the other, or both, of the appellants, nevertheless, the award of $147,-284.41 is excessive. The evidence does not sustain the allowances made by the trial court for Items 1, 8, 12, 16 and 11 shown on plaintiff's Exhibit 49:

Item 1. Overhead salaries during strike period claimed and allowed in the amount of $13,389.00.

Item 8. Equipment rentals claimed in the amount of $27,043.13 and allowed in the amount of $18,938.82.

Item 12. General administrative expense claimed in the amount of $19,257.00 and allowed in the amount of $17,331.30.

Item 16. Efficiency loss for labor and supplies claimed in the amount of $89,370.98 and allowed in the amount of $75,933.89.

Item 11. Loss of profits claimed in the amount of $16,592.34 and allowed in the amount of $5,936.29 (Tr. 142-142, 1157-1158).

VI.

The trial court erred in refusing to permit the appellants to prove on the cross-examination of Sam C.

Guess, one of appellee's witnesses, that on November 3, 1955, when the contract between Associated General Contractors, Spokane Chapter, and Operating Engineers Local 370 was in the process of negotiation, that Dewey Murrow, acting as Chairman of the Contractors Negotiating Committee, stated that they were not then negotiating concerning the Hanford Atomic Energy Project (Tr. 391), and in refusing to permit the appellants to prove by Arthur A. Rossman, a defense witness, that during the negotiations on that date Dewey Murrow specifically stated that they were not negotiating in respect of the Hanford Atomic Energy Project, because the Hanford Works agreement of September 25, 1952 (plaintiff's Exhibit 6) was then in effect and covered that area (Tr. 694-695).

VII.

The trial court erred in denying appellants' motion to dismiss the action at the close of appellee's case in chief for failure to prove that the two contracts of December 19, 1955, and December 24, 1955, effective January 1, 1956, between Associated General Contractors, Spokane Chapter, and the appellant Local Unions (Exhibits 2 and 3) (Tr. 439) were applicable to work within the Hanford Atomic Energy Project (Tr. 445).

VIII.

The trial court erred in adopting and entering as the findings and conclusions of the court the proposed findings and conclusions submitted by appellee on the issue of liability (Tr. 123-140) and entering judgment on such findings and conclusions (Tr. 144-148).

IX.

The trial court erred in refusing to make findings of fact and conclusions of law as requested by the appellants (Tr. 149-168), because to do so would necessitate the entry of a judgment dismissing the action (Tr. 168-169).

ARGUMENT

Argument on Point I Concerning Status of Hanford Atomic Energy Project as a Federal Military Reserve

The basic question presented for decision is what meaning must be given to the expression "Benton County" as used in the two labor contracts (Exhibits 2 and 3) which the appellee claims were breached by the appellants. The appellee claims that Benton County as used in those contracts means that county as it existed territorially in 1943 before the Federal government, with the consent of the State of Washington, converted the lands now constituting the Atomic Energy Project into a national defense reservation. The appellants insist that as a matter of constitutional law "Benton County" as used in the two contracts means Benton County as it existed territorially in December, 1955, when the contracts were executed more than twelve years after the date of the Federal acquisition. If the appellants are correct as to this the judgment must be reversed and the case dismissed irrespective of the merit or lack of merit in the appellants' other contentions.

The Constitution of the United States, Article I, Section 8, provides that:

"The Congress shall have power * * * to exercise

> exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance by Congress, become the seat of government of the United States; *and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;"*

The area in question was acquired by the Federal government for the specific purpose specified in that Section of the Constitution.

Lands acquired by condemnation for Federal uses have exactly the same status as those acquired by voluntary purchase.

Kohl v. United States, 91 U.S. 367, 33 L.ed. 449.

The leading case on the question now under discussion is *Fort Leavenworth Railroad Company v. Lowe,* 114 U.S. 525, 29 L.ed. 264, decided in 1885. The decision, written by Mr. Justice Field, reviewed the historical background of the quoted constitutional provision, the reasons for it and the earlier decisions construing it. One of the earlier decisions cited and approved was *Commonwealth v. Clary,* 8 Mass. 72, decided in 1811 by the Supreme Judicial Court of Massachusetts, in which that court held that the courts of the Commonwealth (Massachusetts) could not take cognizance of offenses committed upon lands in the Town of Springfield purchased with the consent of the Commonwealth by the United States for the purpose of erecting arsenals upon them.

It would unnecessarily prolong this brief to cite

the scores of decisions since that early Massachusetts case to the same effect. Among the later cases are:

Western Union Telegraph Company v. Chiles, 214 U.S. 274, 53 L.ed. 994 (1909, Norfolk Navy Yard);

United States v. Unzueta, 281 U.S. 138, 74 L.ed. 761 (1930, Fort Robinson Military Reservation in Nebraska);

Arlington Hotel Company v. Fant, 278 U.S. 439, 73 L.ed. 447 (1929, Hot Springs Military Hospital);

Surplus Trading Company v. Cook, 281 U.S. 647, 74 L.ed. 1091 (1930, Army Camp in Arkansas);

Standard Oil Company of California, 291 U.S. 242, 78 L.ed. 775 (1934), holding that the San Francisco Presidio is no part of the State of California and reversing the Supreme Court of California;

Murray v. Joe Gerrick & Company, 291 U.S. 315, 78 L.ed. 821 (1934), holding that the Puget Sound Navy Yard is no part of Kitsap County, Washington, and affirming the Supreme Court of Washington in *Murray v. Joe Gerrick Company,* 172 Wash. 365, 20 P.(2d) 591;

Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285, 87 L.ed. 761 (1943), holding that Moffett Air Field in Santa Clara County, California, is no part of that State, and reversing the Supreme Court of California;

Johnson v. Yellow Cab Transit Company, 304 U.S. 518, 88 L.ed. 814 (1944), holding that

the Fort Sill Military Reservation in Oklahoma is not a part of that State, and affirming a decision of the Court of Appeals of the Tenth Circuit;

Murphy v. Love, 249 F.(2d) 783, the Court of Appeals of the Tenth Circuit made the same decision as to the Fort Leavenworth Military Reservation in Kansas.

As a matter of fact, the question now under discussion has been foreclosed against appellee by two decisions already rendered by this court, namely:

Yellowstone Park Transportation Co. v. Gallatin County, 31 F.(2d) 645;

Rogers v. Squire, 157 F.(2d) 948.

In the earlier of these cases, the decision being by Judge Rudkin, it was held that by force of the quoted constitutional provision lands in Yellowstone Park were not taxable by Gallatin County, Montana. In the second cases, the decision being by Judge Healy, it was held that Fort Douglas in Utah is not a part of that State. And an even earlier decision in this Circuit is *Sharon v. Hill,* 24 Fed. 726, p. 731, decided in 1885.

Prior to the First World War the Federal government acquired a large tract of land in Pierce County, Washington, used for the training of Federal troops. It was first known as Camp Lewis and is now known as Fort Lewis. The Supreme Court of Washintgon had occasion to consider the status of that Military Reservation in *Concessions Company v. Morris,* 109 Wash. 46, 186 Pac. 655. The plaintiff had a concession to operate barber shops in that Army Post. The taxing authorities of Pierce County, within the exterior limits of which

the Army Post was located, attempted to tax the property of that concessionaire. The property sought to be taxed was held to be immune from taxation by Pierce County. Perhaps no more concise statement of the applicable law can be found than appears in that decision, where the Washington court said at page 51:

> "Under our law, Rem. Code, Section 9101, only personal property *in* the state of Washington can be listed for taxation, and the question, therefore, must be answered by a determination of whether personal property situated upon this military reservation is *in* the state of Washington. It seems to us that the answer to this is clear, and that such property is *without* the state in both a jurisdictional and territorial sense, for, as we have seen by the constitution of the United States, and the act of the legislature of this state, both the miliary reservation itself and the jurisdiction and legislation over it have been granted to the United States, and thereby there has been created an independent sovereignty the territory of which is surrounded by the state of Washington, but over which the state of Washington has no jurisdiction. A territory has been created which resembles that of the District of Columbia, the only reservation being that the state of Washington can serve civil and criminal process therein on actions arising outside the reservation." (Emphasis by the court)

In that quotation the Supreme Court of Washington likened Camp Lewis to the District of Columbia which was acquired in 1789 by the Federal government by cession from Maryland and Virginia for use as the seat of government. The District as originally ceded by the two States was one hundred square miles, of which ap-

proximately two-thirds was on the Maryland side of the Potomac River and the remainder on the Virginia side. In 1846 the Federal government retroceded to Virginia the area obtained from that State, leaving the District as it now exists entirely surrounded by Maryland. The present land area of the District is sixty-one square miles or less than one-tenth the area of the Hanford Atomic Energy Project. If a labor contract should be executed between an organization, like Associated General Contractors, and a labor union, such as Operating Engineers Local 370, describing the area to which it was to be applicable as "the State of Maryland" we are confident that no court would agree that such a description of "territory and work covered" would extend to the District of Columbia because, before its cession to the United States the District of Columbia was part of the State of Maryland and is now entirely within the exterior boundaries of that State.

A more recent case involving the identical question is *Arledge v. Mabry,* 52 New Mexico 303, 197 P.(2d) 884, decided 1948, in which the Supreme Court of New Mexico, relying in part upon Judge Healy's decision in *Rogers v. Squire,* 157 F.(2d) 948, held that lands acquired by the United States by condemnation and incorporated into the Los Alamos Atomic Energy Project are not in the State of New Mexico. The Los Alamos Atomic Energy Project in New Mexico and the Hanford Atomic Energy Project in Washington were acquired at the same time by authority of the same constitutional provision and have been devoted to exactly the same Federal uses. If the Los Alamos Project is not

in or a part of Sandoval County, New Mexico, certainly the Hanford Project is not in and a part of Benton County, Washington.

Another aspect of the same question became involved in *Lowe v. Lowe,* 150 Maryland 592, 133 Atl. 729, a divorce case. The Maryland statute required that any person seeking a divorce must have been a resident of the State for two years next preceding the application. The plaintiff had resided on a Military Reserve within the exterior limits of that State. The lower court dismissed the action for want of jurisdiction and the Supreme Court of Maryland affirmed, stating that land acquired by the Federal government in accordance with Article I, Section 8 of the Federal Constitution ceased to be a part of the State.

Counsel for the appellee may attempt to distinguish the decisions we have cited upon the ground that in the case of the Hanford Project the Federal government did not elect to take *exclusive* jurisdiction as it might have done pursuant to the quoted provision of the Federal Constitution. The Supreme Court of the United States has already settled that question. Article I, Section 8 of the Federal Constitution provides that "Congress shall have *power* * * * to exercise exclusive legislation, etc." Constitutionally, the Federal government, with the consent of the State, may at its election exercise exclusive power, but it is not required to do so. Whether the power to be exercised shall be exclusive or partial or concurrent is a matter for the Federal and State governments to decide as a matter of practical convenience. In *Collins v. Yosemite Park & Curry Company,*

340 U.S. 518, 82 L.ed. 1502, the United States Supreme Court held that:

> "The National Government and the various states may make mutually satisfactory arrangements as to their respective jurisdiction over territory within their borders, co-operatively adjusting, in the most effective way, problems flowing from our dual system of government; and arrangements of this kind will be recognized by the courts." (Syllabus 1)

The fact that the Federal government in acquiring and operating the Hanford Atomic Energy Project did for its own convenience see fit not to exercise the full measure of the constitutional power that it might exercise, does not destroy the identity of the area as a distinct Federal enclave, for, as the Supreme Court of Washington said in the *Fort Lewis* case, that area "is without the State in both a jurisdictional and territorial sense."

The facts which make the cited authorities controlling are not in dispute. It is elementary that both trial courts and appellate courts will take judicial notice of historical facts sufficiently notorious to be the subject of general knowledge including, among other things, wars in which the United States has been engaged and all matters connected therewith and matters concerning state and local history and especially matters occurring within the limits of the court's own territorial jurisdiction. 20 Am. Jur., Evidence, Sections 50-64, pp. 74-86. Especially in this case the court can take judicial notice of the historical facts relative to the acquisition and operation of the Hanford area. This Court has already

been called upon to consider that subject in *United States v. Priest Rapids Irrigation District,* 175 F.(2d) 524, and *Richland Irrigation District v. United States,* 222 F.(2d) 112. However that may be, the controlling facts in this case were not left as a matter of judicial notice. They were developed by appellants' original and supplemental requests for admissions under Rule 36, Rules of Civil Procedure, and the appellee's answers to those requests (Tr. 53-58; 58-62; 62-63; 64-65). The Court will have in mind that the attack on Pearl Harbor occurred on December 7, 1941, and a declaration of war followed immediately. The undisputed facts developed by the requests for admissions establish that the contract between the United States Atomic Energy Commission and appellee, dated November 25, 1955 (Exhibit 1) covered work to be performed exclusively within the area known as "Hanford Atomic Products Operation" or "Hanford Atomic Energy Project," and frequently referred to during the trial as the "Hanford Area." On February 18, 1943, the war having then been in progress approximately fifteen months, the Secretary of War addressed a letter to the Attorney General stating that it was necessary that the United States acquire certain lands in Benton County, Washington, to be utilized for the establishment of a military reservation and that the utmost haste in expediting the project was vital to the successful prosecution of the war. The proposed establishment was then referred to as "Gable Project." Accordingly, on February 23, 1943, the United States District Attorney for the Eastern District of Washington, at the direction of the Attorney General, filed a condemnation petition in the United States Dis-

trict Court for the Eastern District of Washington, describing the lands sought to be acquired in Benton County, identified as "Area A" containing 176,323 acres, more or less. On that day the court entered an order granting the United States the right of immediate possession upon a showing that the lands were required in time of war for military, naval or other war purposes. Later and on April 12, 1943, the Secretary of War requested that the condemnation petition be amended to include additional lands described as "Areas A, D and E" aggregating a total of 206,123 acres, more or less, of which 199,723 acres were located within Benton County and an additional 6,400 acres, more or less, in Benton, Yakima and Grant Counties. An amended condemnation petition was filed on April 22, 1943, and the court again entered an order granting the United States the right of immediate possession upon a showing that the lands were being acquired in time of war for military, naval or other war purposes. At this time the proposed establishment was called "Hanford Engineering Project." The War Department took possession of all the described lands and thereafter acquired additional lands so that ultimately the Project included in excess of 400,000 acres (625 square miles), the greater portion being within the exterior limits of Benton County. Following the termination of the war Congress passed the Act of August 1, 1946, known as the "Atomic Energy Act" (42 U.S.C.A. Sec. 2011-2281). By authority of that Act the President, by Executive Order No. 9816, dated December 31, 1946 (42 U.S.C.A., page 192, following Sec. 2031) transferred all of the lands and property which at that time

were known as "Manhattan Engineering District, War Department" to the Atomic Energy Commission. At all times since that transfer that Commission has possessed and operated the Project for the production of fissionable material as provided by the Atomic Energy Act of 1946 as amended.

Immediately after the War Department took possession of the described lands it entered into a contract with Du Pont De Nemours & Company for the construction and operation of a plant, the performance of architect-engineer services and other work and services all as directed by the United States Government, and pursuant to such contract and directions fissionable material was produced and used for war purposes. After the transfer of the area to the Atomic Energy Commission it entered into a similar contract with the General Electric Company for the construction of additional plants, the operation of facilities, the performance of architect-engineer services, and for other work and services all as directed by the Atomic Energy Commission, and pursuant to that contract and directions fissionable materials were produced in accordance with the Atomic Energy Act of 1946 as amended by the Atomic Energy Act of 1954.

The contracts of Du Pont and General Electric Companies covered not only the construction and operation of facilities for the manufacture of fissionable materials but also the performance of many related engineering, architectural and research services. The contracts also included the construction, management and operation of extensive housing and business facilities

required to meet the needs of employees, together with all necessary municipal services. The Federal government acquired the lands by purchase and condemnation and has always used them for the construction and operation of a plant for the production of fissionable materials. While the Federal government did not elect to take exclusive jurisdiction of the area, it has controlled all ingress and egress to and from the area and only those with official business and appropriate identification and security clearance have been permitted within the area.

From time to time from February 23, 1943, as the United States acquired additional lands in Benton County and adjoining counties for use as the Hanford Atomic Project Operation, all lands and facilities, the ownership of which became vested in the Federal government, have been immune from taxation by the State of Washington and its political subdivisions, including the County of Benton.

The foregoing facts were developed by appellee's admissions made to the appellants' requests. The appellee also filed original and supplemental requests for admissions under Rule 36 (Tr. 66-85; 86-89; 89-119; 119-121). In the main, these requests and answers developed further facts emphasizing the distinct character of the Hanford area as a Federal reserve. By appellee's requests it was established that after the Hanford area had been transferred to the Atomic Energy Commission by reason of special arrangements between the authorities of the State of Washington, Federal authorities and contractors doing work within the area, compensation to

injured workmen and their dependents was made under a plan similar to the provisions of the Washington Workmen's Compensation Act, but that this plan was administered by special administrative procedures applicable to that area only and not applicable to Benton County or the State generally. That plan for compensating injured workmen and their dependents was established by a contract made pursuant to Chapter 85, Laws of Washington 1943 as amended by Chapter 144, Laws of Washington 1951 (See Request 8, Tr. 68; Answer to Request 8, Tr. 87, and Contract, printed in full at appellee's direction, Tr. 97-119).

The Atomic Energy Act, 42 U.S.C.A. Section 2208, provides:

> "In order to render financial assistance to states and localities in which the activities of the Commission are carried on, and in which the Commission has acquired property previously subject to state and local taxation the Commission is authorized to make payments to state and local governments in lieu of property taxes. Such payments may be made in the amounts, and at the times and upon the terms the Commission deems appropriate * * *."

The appellee saw fit to introduce in evidence Exhibits 17 and 18 (Tr. 767-768). Exhibit 18 is a contract, dated February 16, 1955, between Atomic Energy Commission and Richland School District 400 by which the Atomic Energy Commission assumed the financial obligation of maintaining the public schools, in whole or in part, during the school year 1954. Exhibit 17 is a similar contract, dated February 13, 1956, covering the school year 1955-1956. These contracts both recite that

because all, or substantially all, property that would normally be taxable for the support of public schools had been included in the non-taxable Hanford area, it was necessary that the Atomic Energy Commission advance funds to maintain public schools.

If in 1955 and 1956 Benton County territorially and jurisdictionally was the same Benton County as it had existed territorially before the filing of the condemnation petition on February 23, 1943, why was the Atomic Energy Commission entering into a contract to establish a system of Workman's Compensation applicable to the Hanford area only and making contracts to maintain public schools required because of the activities of the Federal government in that area?

The liability findings proposed by the appellee and adopted by the trial court (Tr. 123-136) fail to state whether the Hanford Atomic Energy Project is or is not a part of Benton County. They simply ignore that vital issue.

The specifications of error next to be argued require an extended reference to the 20 exhibits introduced on the liability hearing (listed and described in Appendix I) as well as detailed reference to much of the oral evidence introduced at that hearing and appearing at various places throughout the three volumes of the printed transcript of record. For more ready reference, we have made an abstract of this oral evidence and are printing it as Appendix II with such comments as seem appropriate. This is a chronological statement of events from December 31, 1946, when the Hanford Area was transferred from the War Department to the Atomic Energy

Commission to May 8, 1956, when the appellee's original complaint was filed.

Argument of Points II and VI
Re Status of Hanford Atomic Works Project

These two specifications of error involve substantially the same general question and may be discussed together.

If, for the reasons stated in the foregoing argument of Point I, the court shall not hold that the Hanford Area, as a matter of constitutional law, is not a part of Benton County, then it will become necessary to consider what the parties intended the term "Benton County" to mean as used in the two labor contracts (Exhibits 2 and 3).

In the preceding section of this brief, entitled: "PROCEEDINGS BEFORE TRIAL," page 3, we stated the substance of the affirmative defense pleaded by both appellants in their respective answers to the effect that the contracts as written do not include, and were not intended to include, the Hanford Area.

Before the introduction of evidence on the liability hearing appellee's counsel made a "motion to strike the affirmative defenses as set forth in the answers of the Teamsters and the Operating Engineers to the amended complaint" (Tr. 182). The only reason then assigned for that motion was that to permit proof as to the circumstances surrounding the parties when the contracts were being negotiated would violate the Parol Evidence Rule (Tr. 183). When granting that motion the court said:

> "They (meaning the parties negotiating for Associated General Contractors and for the Local Unions) certainly knew, as everyone knows, what the situation was with reference to the Hanford area and if they did not intend to, if they intended it should be excluded from this contract it seems to me that the lawyers on one side or the other would have spelled it out in plain English and said so." (Tr. 190)

With the utmost respect to the able and conscientious trial judge, we think that statement is a typical example of begging the question. It is, of course, true that if when the two contracts were being negotiated the Union negotiators had foreseen the possibility that some member of the Associated General Contractors would later claim that the term "Benton County" was intended to include the Hanford area, additional language might have been inserted to expressly preclude that possibility. On the other hand, if it was intended that the term "Benton County" was meant to include the Hanford area the contractors' representatives might likewise have insisted upon some plain language expressly so stating. If express words of inclusion or exclusion would make the contracts clearer than they are, as the trial judge suggested, that is an admission that in the absence of such additional words of inclusion or exclusion the contracts as written are ambiguous in some degree. If that be so, the Parol Evidence Rule is clearly inapplicable. Bearing in mind that these two contracts, effective as of January 1, 1956, were nothing but a revision and a continuation of the earlier contract of September 1, 1952 (Exhibit 4), which had

never been applicable to the Hanford area, it would seem that if the Associated General Contractors intended to so radically change the existing status territorially, the greater obligation was on it to make the meaning clear beyond doubt. The applicable rule is concisely stated in *Nash v. Towne,* 72 U.S. 689, page 699, 18 L.ed. 527, page 529, as follows:

> "Courts, in the construction of contracts, look to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

The rule stated in the cited case has been recognized and applied in this Circuit.

In *Nevada Consolidated Copper Company v. Consolidated, etc.* (U.S.D.C. Nev.) 44 F.(2d) 192, page 199, the court said:

> "It is a fundamental principle of construction that all contracts are to be construed in the light of the circumstances surrounding their execution."

That opinion of District Judge Norcross was adopted as the opinion of this court, 64 F.(2d) 440; Certiorari denied 290 U.S. 644, 78 L.ed. 574. Additional authorities on this point are cited in Appendix III.

For the reasons stated in the preceding argument of Point I, the appellants are not claiming that the con-

tracts are ambiguous or uncertain. It is the appellee that injects the ambiguity, if there is one, by insisting that at the time these contracts were negotiated in the latter part of 1955 the Hanford Atomic Energy Project legally, jurisdictionally and geographically was non-existent. However that may be, the striking of defendants' affirmative defenses has now ceased to be of any great materiality.

In the first place, the appellee to prevail had the burden of proving that the two contracts effective January 1, 1956, were applicable to the Hanford area. It was not relieved of that burden because the appellants affirmatively said that they were not applicable.

In the second place, as the trial court indicated at a later stage of the trial (Tr. 377-378), in view of the oral and documentary evidence, the court was no longer concerned with any technical questions of pleading, but rather with the effect to be given to the undisputed evidence.

In the third place, most of the evidence which would have been admissible, if the affirmative defenses had not been stricken, later came into the record under the trial amendment set forth at page 10.

In the fourth place, both the oral and documentary evidence introduced by the appellee itself proves conclusively that the two contracts in question were not applicable to the Hanford area.

The statement of events from December 31, 1946, to May 8, 1956, detailed in Appendix II, needs but little elaboration, but the following vital facts warrant emphasis and some reiteration.

1) On or about September 21, 1955, Kenneth M. McCaffree, who had ceased to have any connection with the Hanford Contractors Negotiating Committee in the previous October, 1954, started an agitation to eliminate isolation pay and bus transportation. Whether at that time Doctor McCaffree was representing or misrepresenting that committee is not of controlling importance. However, the fact is that his intrusion created apprehension on the part of all concerned, including the executives of the Atomic Energy Commission.

2) At that time (September 1 ,1955) the contract of September 1, 1950 (Exhibit 4) between Associated General Contractors and the Local Unions and the Hanford Works Agreement of September 29, 1952 (Exhibit 6) were both in effect, the first being applicable to construction work outside of the Hanford area, the other being applicable only to similar work within the Hanford area. Both remained in effect until December 31, 1955.

3) The contract between the appellee and the Atomic Energy Commission for the construction of additional facilities (Exhibit 1) was entered into on November 25, 1955, and performance was commenced on November 28, 1955. In that contract the appellee stipulated to continue the working conditions then existing under the Hanford Works Agreement.

4) On December 15, 1955, Doctor McCaffree submitted his first written proposal (Exhibit 12) which, if accepted by the Unions, would have materially changed the then existing Hanford conditions respecting isolation pay and bus transportation. This proposal

not being accepted, Doctor McCaffree then by his letter of December 29, 1955 (Exhibit 16) gave conditional notice of the termination of the Hanford Works Agreement as of December 31, 1955, but stating that the Hanford Contractors would not stop work as of January 1, 1956, but would maintain wages and conditions in effect on December 31, 1955, until new agreement could be completed and that the wage policy would remain unchanged.

5) The pre-job conference attended by Mr. Knack and Mr. Reed, representing the appellee, and by representatives of the Unions was held at Pasco on January 19, 1956. On that day Mr. Knack, the appellee's Director of Labor Relations, made the same identical commitment to both Mr. Thurston of the Atomic Energy Commission and to the Union representatives that Doctor McCaffree had made in his letter of December 29, 1955 (Exhibit 16).

6) Following the cancellation notice of December 29, 1955 (Exhibit 16) Doctor McCaffree continued to make written proposals to the Unions. One of these was made on January 13, 1956 (Exhibit 13) and another was made on the ..... day of March, 1956 (Exhibit 14). Being unable to dominate the situation, Doctor McCaffree, by his letter of March 8, 1956 (Exhibit 10) attempted to assign "bargaining rights" from Hanford Contractors Negotiating Committee to the Associated General Contractors. This was the letter that "flabbergasted" Mr. Guess (Tr. 381-382).

7) During the same period that Doctor McCaffree was making his proposals a legitimate committee rep-

resenting Associated General Contractors of America, Inc., Spokane Chapter, of which Mr. Sam C. Guess was Executive Secretary, was attempting to prevail upon the Union representatives to agree to an addendum or amendment of the contracts effective January 1, 1956, for the express purpose of changing the existing state of affairs respecting isolation pay and bus transportation. These negotiations finally resulted in the "Hanford Project Proposal" of March 10, 1956 (Exhibit 7), which was specifically rejected by the Unions on March 14, 1956, and notice of which rejection was given to the Associated General Contractors at the meeting of March 16, 1956.

If the contracts effective on January 1, 1956, as written, applied to work in the Hanford Area why was Doctor McCaffree and the Committee representing Associated General Contractors during the period from December 15, 1955, to the middle of March, 1956 attempting to get the Unions to agree to amendments?

It will be recalled that Mr. Sam C. Guess, as Executive Secretary of Associated General Contractors of America, Inc., Spokane Chapter, executed the two labor contracts which the appellee claims were breached by the Unions. Mr. Guess' evidence as a witness for the appellee is a complete answer to the appellee's contention that the two contracts as written were applicable, or were intended to be applicable to the Hanford Area.

On his direct examination by counsel for appellee Mr. Guess testified that in the early part of January, 1956, after the two contracts in question had become effective, the Contractors' representatives indicated to

the Union representatives, and particularly to Mr. Sewell Davis of the Teamsters, that they were prepared to sit down and talk about hardship cases and that the proposals made to the Unions would have meant a modification of Exhibits 2 and 3. Those proposals were definitely turned down by the Unions at a meeting on March 16, 1956 (Tr. 326-333).

Later and on cross-examination by counsel for Operating Engineers Local 370 Mr. Guess was even more specific. His attention was called to Exhibit 7 (the Hanford Project Proposal of March 10, 1956). Mr. Guess said it was a copy of a proposal finally drafted and submitted to the Operating Engineers and Teamsters; that it was intended as an addendum to the existing A.G.C. agreements (Tr. 366-367). If there is any doubt as to what Mr. Guess meant by an addendum that doubt is dissipated by his later statement appearing where, in answer to a question concerning Exhibit 7, he said "This was going to be an amendment to the A.G.C. Agreement." (Tr. 386)

Again, on re-direct examination by appellee's counsel, Mr. Guess said:

> "We offered in the instance of the Hanford Agreement to make an addendum to the A.G.C. agreement. * * * It was an addendum—it was to be an addendum to the A.G.C. agreements. * * * We were attempting to arrive at some method or some machinery by which the labor harmony could be reached at Hanford. It was our intention and our express purpose and our expression in writing to those unions to make this machinery or the clauses under which we would operate a part of an

addendum to the normal A.G.C. agreement." (Tr. 394)

During the cross-examination of Mr. Guess an argument arose between counsel for the appellee and counsel for Operating Engineers Local 370. Appellee's counsel then made the novel argument that, in spite of the positive evidence of his own witness, the two contracts between Associated General Contractors and the two appellant Unions (Exhibits 2 and 3), as written, must have become applicable to the Hanford Area because, as he claimed, the Hanford Works Agreement of September 29, 1952 (Exhibit 6) had been cancelled by Doctor McCaffree's letter of December 29, 1955 (Exhibit 16). Hence appellee's counsel argued that if the two labor contracts (Exhibits 2 and 3) did not automatically become applicable to the Hanford Area there would be no written contract to support appellee's claim for damage. This perverted logic has a Latin name but for the moment we have forgotten what it is.

Specification of Error VI requires but little argument.

If the documentary evidence, supplemented by the oral evidence of Mr. Guess, is not sufficient to demonstrate the complete lack of merit in appellee's claim, then clearly under the authorities cited above and in Appendix III it was reversible error to deny appellants' offer to prove that when the two contracts were being negotiated it was specifically agreed that construction work within the Hanford Area was not within the scope of the negotiation.

Mr. Dewey Murrow was Chairman of the Committee

negotiating the contract executed on December 24, 1955 (Exhibit 3) between Associated General Contractors of America, Inc., Spokane Chapter, and Operating Engineers Local 370 (Tr. 354). When Mr. Guess was on the stand as a witness for the appellee counsel for Operating Engineers undertook to prove by him that on November 3, 1955, when that contract was in the process of negotiation, Mr. Murrow stated specifically that they were not then negotiating concerning work within the Hanford Atomic Energy Project. An objection was interposed by appellee's counsel and sustained (Tr. 391). Later, during the presentation of the appellants' case, when counsel for Operating Engineers Local 370 was examining Mr. Arthur A. Rossman, Business Manager of that Local Union, an offer was made to prove that during these negotiations, and specifically on November 3, 1955, Mr. Murrow stated that they were not negotiating in respect of the Atomic Energy Project because the Hanford Works Agreement of September 25, 1952 (Plaintiff's Exhibit 6) was then in effect and covered that area. An objection to this offer of proof was sustained (Tr. 694-695).

If this case is not dismissed by this Court for the reasons already urged, it must be reversed for refusal to permit the proof so offered. Under the authorities cited above and supplemented by the authorities cited in Appendix III, that offered proof was material and vital.

ARGUMENT OF POINT III A

Morrison-Knudsen Company, Inc., Not a Party to Either of the Labor Contracts Involved

The appellee sues for the alleged breaches of two distinct contracts. One (Exhibit 2) is a contract executed on December 19, 1955, between Associated General Contractors of America, Spokane Chapter, and Teamsters Local 839. The other (Exhibit 3) is a contract dated December 24, 1955, between Associated General Contractors, Spokane Chapter, and Operating Engineers Local 370. The appellee Morrison-Knudsen Company, Inc., executed neither of these contracts and, so far as the evidence goes, it never agreed to be bound by either. True, it had become a member of Associated General Contractors sometime in February of 1955, before the contracts were exectued later in that year, but there is no evidence disclosing what rights mere membership in the Association conferred or what obligations mere membership entailed.

Ketcher v. Sheet Metal Workers, 115 F.Supp. 802, is authority for the proposition that the appellee, not having executed either of the contracts, lacks the right to claim damage for their breach. This is a decision of the United States District Court, Eastern District of Arkansas, decided October 14, 1953. It arose out of a labor contract between an association of employers similar to Associated General Contractors and a sheet metal workers union. The plaintiff Ketcher was a member of the employers' association. The contract was executed only by the association and not by Ketcher, that is to say, Ketcher in that case was in exactly the same

position as the appellee is in this case. The complaint set out two causes of action.

The first cause of action was against the union for its alleged breach of contract in failing to furnish workmen requested by the employer.

The second cause of action was against the union and other employers — competitors of Ketcher — for conspiracy, it being claimed that the other employers conspired with the union to deny the plaintiff the workmen he required.

On the first cause of action jurisdiction was invoked solely under the Taft-Hartley Law, being the same provision of that Act which the appellee invokes in this case. That first count was dismissed for the sole reason that Ketcher, not having executed the contract, could not maintain an action for its breach.

The second cause of action, a tort action for conspiracy under Arkansas law, was sustained, not under the Taft-Hartley Law, but solely because its allegations were sufficient to invoke Federal jurisdiction on the ground of diversity of citizenship.

The trial judge in this case, when ruling on appellants' objection, only expressed the view that in the absence of an appellate court decision he was not necessarily bound by the decision of another district judge (Tr. 441-442), and with that we, of course, agree.

When the two contracts were offered in evidence the court admitted them, over objection, saying that proof of membership in the Association was sufficient to justify the admission of the contracts as exhibits, but spe-

cifically stating that eventually there should be more proof in the record in view of the objection. The court at that time said:

> "I would feel more comfortable if you (appellee's counsel) had more proof on it which, I understood, that you were going to produce by other witnesses." (Tr. 201-202)

No proof was produced beyond the bare fact that in February, 1955, the appellee had become a member of the Association. It is not necessary for us to insist that under no circumstances can a member of an employers association maintain an action founded on a contract executed only by the association, although that is what the *Ketcher* case holds. If the appellee had produced some additional evidence, such as the trial judge suggested, possibly the objection based upon the *Ketcher* decision would have been eliminated, but no proof of anything more than bare membership was produced. If, for instance, by Mr. Sam C. Guess, Executive Secretary of Associated General Contractors, the appellee, had proved by the by-laws of the Association, or otherwise, what are the rights and the obligations incident to membership a different situation might be presented. The fact of the matter is Mr. Lee J. Knack, the appellee's Labor Relations Director, testified at some length and at various places in the record that when the appellee became a member of the Associated General Contractors in February, 1955, the Chief Joseph Dam then under construction by the appellee was expressly excluded from the coverage of the then existing contract between Associated General Contractors and the unions affiliated with the Pasco-Kennewick Building Trades Council

(Tr. 197-198, 207). Thus it appears that the appellee now insists upon claiming the benefits of a union contract if it serves its purpose, but otherwise is free to escape its obligations.

It may be that this Court will not find it necessary to decide this particular question because other questions already argued, and remaining to be argued, are decisive whether the *Ketcher* case is right or wrong.

ARGUMENT OF POINT III-B

Concerning Appellee's Commitment at the Pre-Job Conference of January 5, 1956, to Continue Existing Working Conditions Under Hanford Works Agreement

As has several times been stated, Doctor McCaffree on September 21, 1955, nearly a year after he had ceased to be Executive Secretary of Hanford Contractors Negotiating Committee, started an agitation to eliminate isolation pay and bus transportation. This was two months before the contract between the appellee and the Atomic Energy Commission was executed on November 25, 1955 (Exhibit 1). That contract provided for the construction of additional facilities to cost the Atomic Energy Commission in excess of $1,800,000.00, and work was commenced on November 28, 1955, while the Hanford Works Agreement was still in effect. The appellee agreed to observe the provisions of the Hanford Works Agreement so long as it remained in force. Some preliminary work, including some excavation, was already done before the pre-job conference of January 5, 1956 (Reed, Tr. 404). After the contract between appellee and the Atomic Energy Commission had been executed and after the work had been com-

menced Doctor McCaffree on Decembr 29, 1955, wrote the letter by which he attempted to conditionally cancel the existing Hanford Works Agreement, but in that letter he stated that existing conditions would be maintained until a new agreement could be reached (Exhibit 16). Repeatedly throughout the liability hearing counsel for the appellee insisted that Doctor McCaffree did not have any authority to speak for or bind the appellee Morrison-Knudsen (Tr. 229, 260, 492, 729).

The appellants do not claim that Doctor McCaffree did have any authority to speak for or bind the appellee. The fact seems to be that, taking Doctor McCaffree's word for it as appellee's witness on rebuttal, he had no authority to speak for anyone other than himself, and he had no interest in the matter. However that may be, his intrusion had created a delicate situation. It can be readily understood why Mr. Thurston of the Atomic Energy Commission was gravely concerned about the possibility that this major construction program might be interrupted because of the activities of Doctor McCaffree. For that reason he requested Mr. Lee J. Knack, the appellee's Labor Relations Director, and Mr. Ramon E. Reed, its Project Manager, to be present at the conference at Richland on the morning of January 5, 1956. Following that Richland meeting the customary pre-job conference was held at Pasco that afternoon between Mr. Knack and Mr. Reed, representing the appellee, and Mr. Knapp and others, representing the interested unions affiliated with the Pasco-Kennewick Building Trades Council. At that meeting Mr. Knack definitely agreed that the appellee would

continue the payment of isolation pay and the furnishing of bus transportation, as it had been doing since it commenced the performance of its contract on November 28, 1955. Mr. Knack admits that he made this commitment not only to the representatives of the Unions then present, but also to Mr. Thurston of the Atomic Energy Commission. In Appendix IV we have set out a full abstract of all the evidence concerning the commitment, which Mr. Knack admits he did make at that pre-job conference.

Without repeating all the detailed evidence which appears in the appendix, it will be sufficient now to quote one short excerpt from Mr. Knack's cross-examination by counsel for Operating Engineers Local 370:

> "Q. Yes, you say now that what you told them was you were not going to discontinue the isolation pay and you were not going to discontinue the bus transportation?
>
> A. That is correct.
>
> Q. Well, did you say, did you qualify that and say 'Now' or 'Until the end of this job' or 'Halfway through this job?' How did you qualify that, if you did qualify it?
>
> **A. I didn't qualify it."** (Tr. 714-715)

Later, on cross-examination by counsel for Teamsters Local 839, Mr. Knack said:

> "Q. Well, isn't that, in substance, what you meant when this morning you said you didn't want to be used as a wedge, when last Monday or a week ago Monday you said you didn't want to get 'in the

bite of the line?' Isn't that, in substance, what you meant?

A. Well, in substance, what I meant, sir, was that I didn't want to be—our company to be the people who were going to lead the way and be put in a position—as a newcomer to the work, we had not been involved in these things in the past, our position was somewhat different from other contractors, substantially different, as a matter of fact, and that I didn't want my company being the company that was going to be the party to come into that area and cause conditions, either to the area or to ourselves—

Q. That is, you didn't want to disrupt a working arrangement that had been in existence for some considerable time?

A. At the particular time, in view of the conversations that I had had with Mr. Thurston, I felt that it was expedient for our company, even though the request had been unofficial, under the circumstances, to abide by that request.'' (Tr. 722-723)

In conformity with that commitment of Mr. Knack, isolation pay and bus transportation were continued, but on the morning of March 22, 1956, the work stoppage occurred, because, and only because, the appellee violated its commitment and then failed to make the necessary buses available at the North Richland entrance to the barricaded area. The ensuing work stoppage was not a strike by the Unions. It was a lockout by the employer.

In the light of Mr. Knack's unqualified admissions, appellee's counsel, in proposing findings of fact at the conclusion of the liability hearing, could not and did

not ask the court to find that this commitment was not made. Those findings only say that the Knack commitment was not made "as a contractual commitment" (Tr. 136, Finding VIII).

The appellants do not claim that the commitment became binding on appellee because originally made by Doctor McCaffree on December 29, 1955. It became binding upon the appellee because with full knowledge of it and the conditions resulting from it Mr. Knack, who did have authority, adopted it, ratified it and on January 5, 1956, made it his own. It is not important whether Mr. Knack's commitment is called a "contractual commitment" or a "waiver" or an "estoppel." It was formally made to the representative of the Atomic Energy Commission as well as to the representatives of the Unions, and it is futile for the appellee to now claim that it was not to be taken seriously.

In *Texas v. Florida,* 306 U.S. 398, page 425, 83 L.ed. 817, page 835, Mr. Justice Stone, concisely stated a self-evident, legal truth in these words:

> "When one intends the facts to which the law attaches consequences, he must abide the consequences whether intended or not."

One more, and a final, reference to Doctor McCaffree may be warranted. He was called as a rebuttal witness by the appellee and on cross-examination by counsel for Operating Engineers Local 370 (Tr. 733) was being questioned as to his activities subsequent to September, 1955—a year after he had ceased to be Executive Secretary of the Hanford Contractors Negotiating Committee but was still continuing to write letters on

its letterhead and signing those letters as its Executive Secretary. He was asked if in his negotiations with the Operating Engineers Local 370 and Teamsters Local 839 he disclosed to them the facts relative to his authority to speak for that Committee or any of its members, and to that inquiry he made the flippant answer "I was asked for none" (Tr. 735, 746). That brand of business ethics may be permissible—or even commendable—in a Doctor of Philosophy, but if practiced by a less cultured business agent of a labor union he would probably be inviting congressional investigation.

We do not wish to be understood as imputing to appellee's counsel any responsibility for the delinquencies of Doctor McCaffree, if they were delinquencies. On the contrary, we think counsel are entitled to much credit for disclosing the real facts when they produced Doctor McCaffree as their rebuttal witness.

ARGUMENT ON POINT IV

Joint and Several Liability

The judgment entered on April 14, 1958 (Tr. 144-148) provides that the appellee have judgment against the two Local Unions "jointly and severally" in the amount of $147,284.41, with interest and costs.

The appellants requested findings as provided by Rule 52-B of the Rules of Civil Procedure which findings appear in the Transcript of Record, Vol. 1, pp. 149-168. In addition to the request for proposed findings, appellants moved that the judgment entered on April 14, 1958, be altered and amended (Tr. 170) by striking therefrom the provision that the appellee have judgment against the appellants *jointly and severally*

for the reason that the evidence failed to establish any joint liability in the amount stated, or in any amount whatsoever. When this motion to amend the judgment was presented to the trial court on May 8, 1958, counsel for the appellee, by plain implication if not by express statement, agreed that the judgment as originally entered would have to be amended and thereupon drafted an amendatory order which the trial judge entered on that date (Tr. 171-174).

Two separate and distinct contracts are involved:

(1) A contract between Associated General Contractors and Teamsters Local 839, dated December 19, 1955 (Exhibit 2). The Engineers Local 370 is not a party to that contract.

(2) A contract between Associated General Contractors and Engineers Local 370, dated December 24, 1955 (Exhibit 3). Teamsters Local 839 is not a party to that contract.

The appellee, Morrison-Knudsen Company, Inc., is not named as a party to either of these contracts and the evidence fails to establish that at any time before the work stoppage occurred on March 22, 1956, it ever agreed to be bound by either of the contracts for the alleged breach of which it is now claiming damages. For the present purposes it may be assumed that the appellee might have maintained an action on one or the other or both contracts because, and only because, it claims it was a member of the Associated General Contractors at the time the contracts were negotiated in December, 1955. Whether or not mere membership in Associated General Contractors without more makes the appellee

a beneficiary of the contracts is not material to the present question.

If it were not for Rule 20-a of Federal Rules of Civil Procedure the attempt to sue the two Locals on different contracts in one action would have amounted to a fatal misjoinder of both parties and causes of action. In the absence of that rule the appellee would have been required to bring one action against Teamsters Local 839 and another separate and distinct action against Enugineers Local 370. This is so because Engineers Local 370 could not be sued for breach of the Teamsters' contract, and likewise Teamsters Local 839 could not be sued for breach of the Engineers' contract. If two separate actions had been brought, one by the appellee against Teamsters Local 839 and the other by the appellee against Engineers Local 370 the trial court, in its discretion, as a matter of convenience, might have tried both actions together, but at the conclusion of the evidence separate and several judgments against each would have been required. There could not be one joint and several judgment against both.

> "Plaintiffs who sue as joint contractors must show a joint interest in the same subject. *And if two or more are sued jointly, plaintiff has the burden of showing a joint substantial liability on the part of all defendants* * * * 13 C.J., p. 761, Sec. 949, Title "Contracts."
>
> "In the absence of a statute providing otherwise, where the promises are several in respect of the promisees, they must sue separately and cannot sue jointly, * * *." 17 C.J.S., p. 808, Sec. 352, Title "Contracts."

"At common law, persons liable on separate and distinct contracts may not be joined as defendants in one action; several persons bound by the same contract may be sued jointly *if they are bound jointly, but not if they are only severally bound;* if several persons are bound by a contract jointly and severally, plaintiff may at his election sue one or all of such persons but not an intermediate number.

"Persons liable on several and distinct contracts or obligations, although with the same person or set of persons, may not be joined as defendants in one action at common law, but each must be sued separately; * * *

"Where a contract entered into by several obligors is so framed that they are bound severally only, each obligor being responsible only for his own acts or obligations, *they may not be sued jointly at common law, but the action must be against each obligor separately.* * * * " 67 C.J.S., p. 949, Sec. 35, Title "Parties."

"Persons who are bound severally are separately liable, and their obligations may and must be enforced separately in the absence of a statute to the contrary. * * * " 20 Am. Jur., p. 816, Sec. 269.

"The circumstance that promises are contained in separate instruments though in identical terms shows the promises to be several." Williston on Contracts, Vol. 2, Sec. 323, p. 940.

The joinder of the two Local Unions in a single action was permissible because, and only because, Rule 20-A, Federal Rules of Civil Procedure, provides that several parties may be joined as defendants "if any question of law or fact common to all of them will arise in the action," but that rule further provides for judg-

ment "against one or more defendants according to their respective liabilities." Rule 20-A is one of procedure only. It does not create any substantive rights or liabilities that would not exist in its absence.

In *Lansburgs & Bro., Inc. v. Clark,* 127 F.(2d) 331 (a decision by the United States Court of Appeals of the District of Columbia), the court at page 333 said concerning this very rule:

> "We are of opinion that the bringing of a single joint action under the new rules does not affect the respective rights of the parties. At common law, the two causes of action could not have been joined. That they now may be, does not change the result. *The causes remain as separate and distinct as if commenced separately.* Rule 20 neither has, nor was intended to have, any effect on the substantive rights of the parties, and itself states that judgment may be given 'for one or more of the plaintiffs according to their respective rights of relief.' Obviously, therefore, it is simply a procedural rule, the sole purpose of which is to remove the procedural obstacles of the common law."

Lansburgh v. Clark was followed in *Gallagher v. Merritt, etc.,* 86 F.Supp. 10, the court saying, p. 13:

> "It is stated therein that Rule 20 neither has nor was intended to have any effect on the *substantive rights* of the parties, and that obviously it is simply a procedural rule, the sole purpose of which is to remove the procedural obstacles of the common law." (Italics by the court)

What the situation might be had the appellee elected to bring some appropriate action in tort against both defendants is beside the question. Appellee having elected to sue for alleged breaches of two separate con-

tracts *substantive contract law* applies. The liability of these two appellants, whatever else it may be, is not joint and several.

If the judgment as originally entered on April 14, 1958 (Tr. 144-148) is compared with the amendatory order of May 8, 1958 (Tr. 171-174) it is perfectly apparent that no substantial change was effected. The original judgment states that the appellee shall have judgment against the two appellants jointly and severally. The amendatory order of May 8, 1958, eliminated the expression "jointly and severally" and then, after reciting that the appellee shall recover the stated sum, states that:

> *"It Is Further Ordered that the satisfaction of said judgment against either defendant shall automatically operate as a pro tanto satisfaction of the judgment against the other defendant, to the end that plaintiff shall in no event collect from said defendants either individually or jointly, more than the total amount of the judgment, interest, and costs as aforesaid."*

It will thus be seen that the amendatory order accomplishes exactly nothing. It merely removes the "joint and several" label of the original judgment and in other words provides for what is in fact a joint and several judgment. The label has been removed but the substance remains exactly as it was before. Again it should be emphasized that jurisdiction in this action was invoked solely under Section 301 of the Labor Management Relations Act of 1947, otherwise known as 29 U.S.C.A. Section 185, quoted *supra,* page 2, which specifically limits the jurisdiction of the District

Court in this class of cases to suits for violation of contracts. It was because of that restricted jurisdiction of the District Court that the appellee's counsel were compelled to acquiesce in the dismissal of Teamsters Joint Council 28 and Western Conference of Teamsters.

There is no evidence in the record by which this Court can now assess damages as between Teamsters Local 839 and Operating Engineers Local 370, according to their respective liabilities. For that reason, if for no other reason, this action must be dismissed.

ARGUMENT OF POINT III-C

The Appellee Violated the Very Provisions of the Two Labor Contracts Which It Claims Were Breached by Appellants

It may be unnecessary to reiterate that the appellants do not admit that either the Teamsters' contract dated December 19, 1955 (Exhibit 2) or the Engineers' contract dated December 24, 1955 (Exhibit 3) has any application to the appellee's work in the Hanford Area. For the purposes of argument only we will assume that those contracts, as written, were applicable to that work.

The sole basis of appellee's action for damage is that the Unions violated two provisions of those contracts, which we now quote again:

> "ARTICLE VIII—NO STRIKE—NO LOCKOUT.
>
> "It is mutually agreed that there shall be no strikes, lockouts, or other slowdowns or cessations of work authorized by either party on account of any labor differences pending the full utilization of the grievance machinery set up in Article X * * *."

"ARTICLE X — SETTLEMENT OF DISPUTES AND GRIEVANCES

"Section 1. If a dispute involving the application or interpretation of the Agreement shall arise (other than jurisdictional disputes), written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either **EMPLOYER** or the **UNION**) to the other. If the two parties are unable to adjust the same within forty-eight (48) hours, the dispute shall be settled by the following procedure. * * * " (Emphasis in the contract itself).

These quotations are from the Operating Engineers' contract (Exhibit 3). The same provisions, in identical language, appear as Articles VII and IX in the Teamsters' contract (Exhibit 2).

As already has been shown, the Associated General Contractors, by its "Hanford Project Proposal," dated March 10, 1956 (Exhibit 7) sought to prevail upon the Unions to agree to amendments to make the contracts applicable to the Hanford Area. This proposal was rejected by both Unions on March 14, 1956. That rejection was communicated to the Associated General Contractors of America, Inc., at the meeting of March 16, 1956. Following that rejection the appellee summarily took matters into his own hands and refused to continue the customary bus service. The work stoppage then ensued. That work stoppage was not a strike by the Unions prohibited by the contracts. It was a prohibited lockout by the Employer.

Again assuming, for the purposes of argument only, that the contracts were applicable to the Hanford Area,

if the Unions violated their contracts when on March 16, 1956, they definitely and unqualifiedly refused to recognize their contractual obligations to the appellee, as a member of the Associated General Contractors, then the quoted article of the contracts relative to the settlement of disputes and grievances came into play. At that time it was then imperative that the appellee, as the employer and the offended party, *give written notice of a demand for arbitration and in no event later than ten days.* There is not the slightest suggestion of evidence that the appellee complied with that provision of the contracts.

As stated by Mr. Reed, appellee's Project Manager, the job was not picketed until April 5, 1956—thirteen days after the appellee had ceased to furnish the customary bus service (Tr. 409).

In stating that there was no compliance on the part of the appellee with the provision of the contracts requiring written demand for arbitration within the limited ten-day period, we are not overlooking the statement made by Mr. Sam C. Guess when, as a witness for the appellee, he was testifying concerning the meeting of March 16, 1956, and said that "we (the contractors) offered to arbitrate" (Tr. 333). When read in context, it is perfectly apparent that what Mr. Guess was then talking about was mediation and not arbitration. The two terms "arbitration" and "mediation" are frequently and properly used interchangeably. At other times they have distinct meanings. In the vernacular of labor relations (or jargon—if that be a better word) arbitration is a process of calling in some third party to settle a

dispute which has arisen under an admittedly existing contract. Mediation means calling in some third party to assist negotiators in agreeing upon the terms of a contract not yet executed. The matter being considered by the parties on March 16, 1956, to which Mr. Guess was referring, was the contractors' proposal (Exhibit 7) to amend the existing contracts. The contracts as written required both parties to submit disputes to arbitration. Neither party was obligated to invoke mediation as a means of arriving at a contract or an amendment to a contract not yet executed. That this is the sense in which Mr. Guess used the word "arbitration" is evident from the fact that appellee's counsel himself referred to this very matter as "some offer to arbitrate or mediate this matter of the dispute" (Tr. 396).

We will not burden the Court with citation of authorities to the effect that when a party sues for a breach of contract the complaining party must allege and prove that it performed the contract on its part, or at least was willing to perform if not prevented by the other party. Under the liberal rules of pleading now prevailing in the Federal courts the absence of an allegation of performance perhaps is not vital, but proof of performance is, nevertheless, imperative as a condition to the recovery of claimed damage for breach of contract.

SPECIFICATIONS OF ERROR VII, VIII AND IX

These specifications are merely formal and require no further argument.

The findings and conclusions proposed by the appellee on the liability issue and adopted by the trial court

(Tr. 123) completely ignore the undisputed oral and documentary evidence already described.

The findings and conclusions on liability proposed by the appellants (Tr. 149) were rejected by the trial court only because to enter any of them would compel a judgment of dismissal (Tr. 168-169).

ARGUMENT ON POINT V CONCERNING THE DAMAGE AWARD

The original contract price for the two main areas, where the work was to be performed by plaintiff for the Atomic Energy Commission, was $1,777,180.00. This sum was the total of Area 100-F $908,380.00, and Area 100-H $868,000.00 (referred to hereafter as F and H). The contract price for those areas and three other lump sum items which comprised all of the work to be performed was $1,869,580.00 (Tr. 878-881). The contract sued upon involved the construction of pumping plants, and the two structures involved were basically concrete construction (Tr. 876-877). The plaintiff's bid was a lump sum bid that included the profit expected to be made (Tr. 791, 802, 946, 1100, 1116-1118). The plaintiff, regardless of the work stoppage or claimed breaches of contract by the defendants, would have sustained loss on the contract (Tr. 947, 948), though the bid lump price included the profit mark-up. No money penalties were imposed against the plaintiff because of delay (Tr. 790), and though plaintiff claimed "increased costs" by reason of delay, profits were allowed in addition thereto, and entered as part of the judgment (Tr. 1144-1145, 142-143, 148).

By reason of denial of liability, all items of claimed damage are resisted. Argument here will be directed to four of the items set out under Point V as follows, which defendants, in any event, contend are excessive and not supported by the evidence:

ITEM 8. Equipment rental claimed in the amount of $27,043.13 and allowed in the amount of $18,938.82.

ITEM 12. General administrative expense claimed in the amount of $19,257.00, and allowed in the amount of $17,331.30.

ITEM 16. Efficiency loss for labor and supplies claimed in the amount of $89,370.98 and allowed in the amount of $75,933.89.

ITEM 11. Loss of profits claimed in the amount of $16,592.34 and allowed in the amount of $5,936.29 (Tr. 142-143, 1157-1158), discussed under subsection (A) following.

(A) Equipment rental in the amount of $18,938.82 was allowed in Item 8, to which a mark-up of 10% profit was added (Tr. 1145, 142, 143, 148). Plaintiff contended that regardless of actual costs charged by plaintiff for equipment used on this particular job at Hanford, it was entitled to an additional award for fair rental value of the equipment. Defendant contends that plaintiff is entitled only to rentals charged by the principal office of plaintiff at Boise, Idaho, and carried as charges to the instant contract. The court, though expressing doubts about plaintiff's position (Tr. 836-839), made an allowance for rental in an amount exceeding double the charges actually made to the contract (Deft. Ex. 56, p. 5; Tr. 1061-1066).

The amount allowed by the court was excessive in the sum of $11,695.91, that amount being the excess of rentals allowed over the charges made to the contract, plus 10% of the total allowance for profit (Tr. 142, Item 8 plus 10% of said item, minus $9,136.79 actual charge —see Ex. 56).

Because the contract was a lump sum contract including the profit, the allowance of the excess charge was not compensatory but was in fact a further duplication of profit (Tr. 802). The allowance was excessive, and based wholly on a conjectural basis. The logical and only reasonable inference to be drawn from the facts is that profit for the use of the machinery was included in the bid. Thus if company rental charges are compensated as the measure of loss, allowance as to further and additional profits is excessive, and wholly speculative.

There is a double duplication here, because further profit in addition to costs was allowed on a contract, which was bid with a profit margin included. Rental value of the machinery is allowed in addition to the fixed profit in the contract *plus* a further profit of 10% on the rental value.

The applicable rule is stated in 15 Am. Jur., Damages, p. 547 last paragraph Section 137:

> "In some jurisdictions, recovery cannot be had both for loss of profits, assuming that such damages are recoverable, and for expenditures, since, it is said, this involves a double recovery."

This matter was touched upon rather obliquely in *Lloyd v. American Can Co.,* 128 Wash. 298, 309, 222 Pac. 876:

> "Reasonable compensation is the measure of damages for the wrongful breach of a contract. Some of the authorities hold that a plaintiff may not recover both loss of profits and expenses incurred in preparing to perform the contract, because a duplication of recovery would result. We are not troubled with that question here because the respondent did not seek to recover any loss of profits."

However, when the Washington Supreme Court did face the question of duplication of recovery in *Platts v. Arney*, 50 Wn.(2d) 42, 47 (1957), 309 P.(2d) 372, it said:

> "However, where the plaintiff sues for his loss of profit, he cannot recover *in addition* to this the expenditures which he would have had to make in any event to carry out his own promises under the contract. See annotation: 17 A.L.R.(2d) 1300, Section 8."

What has been said above applies equally to Item 11, where an award of lost profits was allowed in the sum of $5,936.29, being the total of 10% profit allowed on Items 1, 2, 8, 10, 12, 15, 17 (Tr. 143).

Both accountant witnesses for defendants denied profit allowances for the same reason (Tr. 1100, 1116, 1117). It being definite, that plaintiff would not have made any profit, none should have been allowed. 15 Am. Jur. page 558, Section 150.

(B) Item 12 was an allowance (Tr. 947, 948) for general administrative expense in the sum of $17,331.30. The manner of computing the general administrative expense is set out in the Transcript at pages 816 and 1023. Apparently plaintiff was offering alternate

methods of computation (Tr. 1024). The first calculation in the words of plaintiff's witness Reed was:

> "We have taken for April the number of days in April and the original scheduled revenue for that month and the same with May and June, and then added the total (1137) number of days for those three months and the 91 days the original scheduled revenue was $702,380. The actual revenue which was the only month that we received revenue, was $104,972, and the net short was the difference between the 702 and the 104, or $597,608. And then that divided by the 91 days in the three months gives us a net revenue short per day of $6,550, and then the revenue, administrative expense revenue short for the period of 98 days was multiplied by 3%, which is the percentage the job is charged for general administrative expense, which amounts to $19,257." (Tr. 816)

The second method of calculation, according to plaintiff's witness Madsen, was as follows:

> "Q. (By Mr. DeGarmo): I am handing you Plaintiff's Exhibit 53 for identification, will you state what it is? (hands paper to witness)
> (Testimony of R. H. Madsen)
>
> A. General administrative expense, and it is a recalculation of the previous one and it is based on an average daily scheduled revenue over the full period of the 285 days in 100-F and 315 days in 100-H.
>
> Q. Were those the number of days which were the originally scheduled time for completion of this contract?
>
> A. Yes, sir.
>
> Q. And the number of days which are shown on the graphs, Plaintiff's Exhibits 21 and 22?

A. That is correct.

Q. And when you used that alternative method of computation, what did you find was the daily average as compared with Plaintiff's Exhibit 30?

A. The new calculation shows an average daily of $5,944, compared with $6,550 used in the previous calculation (1446).

Q. And using the same method of calculation, that is, the 98 days times the average amount, plus or times the 3%, what do you arrive at?

A. $17,475." (Tr. 1022-1023)

It can be seen from the above that plaintiff produced its claimed loss figure from methematical calculations bottomed on an average daily scheduled revenue, but bitterly complained about defendants' auditors determining their computations from actual average revenue received (Tr. 1103-1109). Defendant contends that plaintiff's claimed Item 12 is based on the same faulty kind of mathematical calculation as was its original claimed Item 11 (Tr. 42-43). Plaintiff produced no records of expenses or accounting entries and based its claim wholly on a projected revenue calculation not supported in fact, or by plaintiff's performance up until the date of the work stoppage when it was about $227,000 behind its projected revenue schedule (Tr. 850). The reasonable inference here would be that the percentage of 3% charged on the average daily projected and scheduled revenue is a percentage of a hope or guess and wholly speculative, for the record clearly shows that the actual revenue on the day of the work stoppage was 36% behind schedule. It is definite that in

March, 1956, the projection of plaintiff was wholly in error, and certainly such a calculation cannot stand.

(C) This argument shall be directed to Item 16, where the court made an allowance, and entered judgment for $75,933.89, (Tr. 142, 148) upon claim for $89,-370.98. As to this item, plaintiff's claim has fluctuated between the amount of $55,280.00 originally claimed in itemization of Bill of Particulars of plaintiff's amended complaint (Tr. 36) and the amended damage claim in trial amendment of $92,835.29 (Tr. 37, 44-46, 48).

Though the former tendency of the courts was to restrict recovery to such matters as were susceptible of having attached to them an exact pecuniary value, it is now generally held that the uncertainty referred to is uncertainty as to the fact of damage, and not as to its amount. Thus the rule is accepted that, where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude a recovery.

However, the plaintiff must still produce the best and most reasonable evidence available; he must produce the best and most reasonable computation under the circumstances of the case. If defendant produces the best and most reasonable evidence and computation, an allowance of damages to plaintiff, grossly in excess of the substantial damages determined under defendants' best and most reasonable evidence and computation will be deemed to be excessive. The law does not in this case allow a premium to plaintiff by way of punitive damages.

Defendants' tabulations of excess labor costs were computed on the same basis as plaintiff's Bill of Par-

ticulars, with wholly different results. We suggest defendants' tabulation is not only accurate, but is the best and most reasonable basis for the damages sustained by plaintiff, assuming defendants' liability.

The concrete work was the major part of plaintiff's project in areas F and H (Tr. 820). Plaintiff, in determining its labor costs prior to the work stoppage, employed a formula in which the number of cubic yards of concrete poured was divided into the labor costs up to the period of March 31st, and the difference between that cost and the cost achieved by the same method of computation over the period from June 6th to September 30th was determined to be the excess cost of labor (Tr. 824), and more fully detailed by plaintiff's witness Nelson (Tr. 925-929).

Plaintiff, in submitting a computation in support of its claim for damages as the result of excess material costs proceeded under a formula which determined (1) the entire cost of the materials used in the pouring in the F and H areas, (2) the sum of money resulting from the number of yards of concrete poured multiplied by the engineer's estimated cost of material, which was $6.10 per yard in the F area and $6.49 per yard in the H area (Tr. 826-829, 929-937). Amount No. 2 was then subtracted from amount No. 1 leaving the amount claimed by plaintiff. No acceptable reason was given by plaintiff's witnesses for the increased cost of the materials over the engineer's estimate and plainly no substantial basis exists for the claim (Tr. 937). With a price constant as to materials used, no reasonable basis exists for the excess cost of materials claimed.

Defendant contends, with regard to plaintiff's claim of excess labor costs, that the plaintiff gives no consideration whatsoever to the excess labor costs of the project incurred as a result of an excess pour of concrete over the plaintiff's engineering estimates. Plaintiff's witnesses freely admitted that the concrete pour in the two areas F and H was about 1,050 yards over the engineer's estimated pour, and that no consideration was given to this item in computing claimed excess labor costs (Tr. 852-857). Defendants urge that they are not properly chargeable with excess costs that arise from the substantial amount of additional costs of the excess pour of concrete, which was far beyond the estimates and projection of plaintiff, and they contend that the proper method of determining efficiency loss is to base such determination on the amount of pour remaining after the excess pour cost has been subtracted. Defendants submit that this is a reasonable and proper method of arriving at unit cost per yard and the over-all total of claimed loss. This is particularly an applicable formula here because plaintiff's lump sum bid did not include any excess pour (see explanation and computation, Defendants' Exhibit 56, pp. 10-13).

Plaintiff's claim with respect to excess material costs is built on a premise which is so questionable as to make a computation wholly uncertain as to the fact of damage. Plaintiff has lumped together all of the cost of materials used for the pour and has then come up with an excess cost item by subtracting from that amount the original engineering estimates of costs. There is absolute uncertainty in such a method, and there is no basis

for assuming the correctness of those estimates (Tr. 828-829, 929-937).

The testimony of plaintiff's witness Nelson (Tr. 929-937) plainly indicates the conjectural basis of plaintiff's computation. For instance, the witness indicated that under "supplies" there was so much "stuff" with such considerable "use," such as form materials, lumber, etc., that it could be used over and over again, and that the longer materials were used the less the supply cost would be; that an attempt to estimate the actual cost item as of March 30th wouldn't mean anything (Tr. 934), and that the whole claim of plaintiff is built upon a mathematical process in which the only substantiating factor was pure estimate (see also Defendants' Exhibit 56, p. 13).

The record discloses that plaintiff's estimates are not entitled to be considered as proof of the certainty of the fact of damage, for plaintiff was admittedly wrong in its estimate as to the progress of the work, which by plaintiff's own admission was 18 days behind schedule at the time of the work stoppage in March, and which schedule was 44 days behind so far as plaintiff's revenue projection was concerned (Tr. 847-852, Defendants' Exhibit 56, p. 13). Plaintiff's estimate of the amount of concrete to be used was likewise in error (Tr. 854-855). Plaintiff's bid estimates under the entire lump sum bid on the contract were in error so that plaintiff lost money on the contract, regardless of the extent of its recoveries on contingent claims, in one of which plaintiff was again the erring party (Tr. 861, 947, 948, 1040-1044). Plaintiff's estimates as indicated

in its projection charts (Plaintiff's Exhibits 21 and 22) were also in error. As the court remarked, "I think you can demonstrate, as Bobby Burns said, 'The best laid schemes o' mice and men gang aft a-gley.' As a matter of fact, this resulted in a loss without strike benefits" (Tr. 1009-1010). And see (Tr. 1137-1138).

As the Supreme Court of the State of Washington said in *National School Studios, Inc., v. Superior School Photo Service, Inc., et al.,* 40 Wn.(2d) 263, 275,

> "The bare, oral statement by appellant's president that it made 10 per cent profit on the dollar volume of the business obtained by Lien is a mere conclusion. It does not constitute the reasonable certainty of proof which is required under the circumstances shown to exist in this case."

We submit that if damages are awarded under Item 16, the proper amount, assuming liability, would be $38,209.94 (Defendants' Exhibit 56, pp. 12-13). Thus the total of excess damages awarded plaintiff in the items discussed (Item 11, PROFIT, $5,936.29; Item 8, EQUIPMENT RENTAL, $9,802.03; Item 12, ADMINISTRATION EXPENSE, $17,331.30; Item 16, LABOR AND MATERIALS EFFICIENCY LOSS, $37,723.95 (derived from $75,-933.89, court award — minus $38,209.94 defendants' figure) Total $70,793.57.

CONCLUSION

To be entitled to a judgment in its favor the appellee, as plaintiff, had the burden of proving not one or two but all the five elements of a complete case, namely:

(a) That it was a party to one or the other or both

of the labor contracts that became effective January 1, 1956.

(b) That those contracts were applicable to appellee's work to be done within the limits of the Hanford Atomic Energy Project.

(c) That the appellee performed the contracts on its part and that one or the other or both of the appellants without cause breached them.

(d) That the appellee sustained damage in a total amount established with reasonable certainty; and

(e) The amount of that total damage properly chargeable to each appellant under its separate contract.

The appellee failed to establish any one of these indispensable elements.

On the other hand, the evidence is undisputed that the appellee's work for the Atomic Energy Commission was commenced on November 28, 1955, under the then existing Hanford Works Agreement (Exhibit 6) and was continued until March 22, 1956, under the commitment made by Lee J. Knack, appellee's Director of Labor Relations, on January 5, 1956, to both Mr. Thurston of the Atomic Energy Commission and to the unions affiliated with the Pasco-Kennewick Building Trades Council, including the two appellants.

For these reasons the case must be dismissed in this Court.

In any event, the judgment must be reversed for refusal of the trial court to permit the appellants to prove that when the contracts were in the process of negotiation the representatives of the contractors and of the

unions agreed that they were not dealing with the Hanford Area (Point VI).

Finally, the award of damage made by the trial court is excessive at least to the amount of $70,793.57.

Respectfully submitted,

BASSETT, DAVIES & ROBERTS
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Attorneys for Appellant,
Teamsters Union Local 839

R. MAX ETTER
Attorney for Appellant,
Operating Engineers Local No. 370

APPENDIX I

EXHIBITS INTRODUCED ON HEARING OF ISSUE OF LIABILITY

Plaintiff's Exhibits

1:	Contract dated November 25, 1955, between Morrison-Knudsen Company, Inc., and Atomic Energy Commission for the construction of facilities at Hanford Works, Richland, Washington, for the lump sum of $1,869,580.00.	Identified Tr. 194 Offered Tr. 195 Admitted Tr. 195
2:	Contract dated December 19, 1955, between General Contractors of America, Inc., Spokane Chapter, and five Local Unions of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, including Local 839 of Pasco, Washington.	Identified Tr. 199 Offered Tr. 200 Admitted Tr. 203
3:	Contract dated December 24, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and International Union of Operating Engineers Local No. 370.	Identified Tr. 199 Offered Tr. 200 Admitted Tr. 203

Defendants' Exhibits

4:	Contract dated September 1, 1950, between the Associated General Contractors of America, Inc., Spokane Chapter, and the International Union of Operating Engineers Local No. 370 and five Local Unions of International Brotherhod of Teamsters, Chauffeurs and Warehousemen of America, including Local 839 of Pasco, Washington.	Identified Tr. 217 Offered Tr. 218 Admitted Tr. 220
5:	Letter dated July 17, 1952, offered by defendants and not admitted.	(Tr. 309)

Plaintiff's Exhibit

Pl. Ex. 6:	Contract dated September 29, 1952, between Employer Negotiating Committee and Pasco-Kennewick Building Trades Council and Union Negotiating Committee, accepted by various local unions, including Operating Engineers Local 370 and Teamsters Local 839. This contract became known as "Hanford Works Agreement."	Identified Tr. 317 Offered Tr. 317 Admitted Tr. 317

Defendants' Exhibit

Def. Ex. 7:	Document dated March 10, 1956, entitled "HANFORD PROJECT PROPOSAL" made by Associated General Contractors of America, Inc., Spokane Chapter, to Operating Engineers Local 370 and Teamsters Local 839. Voted on on March 14 by Teamsters and rejected, and also rejected by Operating Engineers.	Identified Tr. 366 Offered Tr. 367 Admitted Tr. 367

Plaintiff's Exhibits

Pl. Ex. 8:	Letter dated March 30, 1956, from Sam C. Guess, Executive Secretary of the Associated General Contractors of America, Inc., to Art Rossman, Operating Engineers Local 370, referring to work stoppage which commenced on the preceding Thursday, March 22, 1956.	Identified Tr. 429 Offered Tr. 431 Admitted Tr. 431
Pl. Ex. 9:	Letter dated April 3, 1956, from Arthur A. Rossman, Business Manager of Operating Engineers Local 370, to Sam C. Guess, Executive Secretary, Associated General Contractors of America, Inc., Spokane Chapter.	Identified Tr. 430 Offered Tr. 431 Admitted Tr. 431

Defendants' Exhibit

Def. Ex. 10:	Letter dated March 8, 1956, signed Kenneth M. McCaffree, Executive Secretary, to Eastern Washington Building Chapter and Associated General Contractors of America, Inc., stating that effective March 9, 1956, bargaining rights held by Hanford Contractors Negotiating Committee are assigned to Associated General Contractors, Inc., Spokane Chapter.	Identified Tr. 546 Offered Tr. 548 Admitted Tr. 548

Plaintiff's Exhibit

Pl. Ex. 11:	Calendar for years 1955, 1956 and 1957.	Identified Tr. 593 Offered Tr. 594 Admitted Tr. 594

Defendants' Exhibits

Def. Ex. 12:	Letter dated December 15, 1955, on letterhead of Hanford Contractors Negotiating Committee, signed Kenneth M. McCaffree, Executive Secretary, to International Union of Operating Engineers Local 370 enclosing a proposed memorandum of agreement between Hanford Contractors Negotiating Committee and various local unions affiliated with Pasco-Kennewick Building Trades Council.	Identified Tr. 604 Offered Tr. 604 Admitted Tr. 608
Def. Ex. 13:	Letter dated January 13, 1956, on letterhead of Hanford Contractors Negotiating Committee, signed Kenneth M. McCaffree, Executive Secretary to International Union of Operating Engineers Local No. 370, enclosing a proposed memorandum agreement to make the contract of Operating Engineers Local 370, dated December 24, 1955 (Exhibit 3 above described) applicable to Hanford Project with certain stated exceptions.	Identified Tr. 612 Offered Tr. 624 Admitted Tr. 624

Def. Ex. 14:	Document entitled "Memorandum of Agreement" between International Union of Operating Engineers Local No. 370 and Hanford Contractors Negotiating Committee, signed by three individuals, including Kenneth M. McCaffree, as Hanford Contractors Negotiating Committee. This Exhibit is dated the — day of March, 1956.	Identified Tr. 625 Offered Tr. 625 Admitted Tr. 626
Def. Ex. 15:	Letter dated March 2, 1956, on letterhead of Hanford Contractors Negotiating Committee, signed Kenneth M. McCaffree, Executive Secretary, to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 839, relative to certain proposals as to classifications and rate of pay to be applicable to Hanford Area as of January 1, 1956.	Identified Tr. 656 Offered Tr. 656 Admitted Tr. 657
Def. Ex. 16:	Letter dated December 29, 1955, on letterhead of Hanford Contractors Negotiating Committee, signed Kenneth M. McCaffree, Executive Secretary to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local 839 and Pasco-Kennewick Building and Construction Trades Council and other Locals signatory to the construction collective bargaining agreement Hanford Works, stating that Hanford Contractors Negotiating Committee is exercising the right to terminate the Hanford Works agreement as of December 31, 1955, but stating that the Hanford Contractors will not stop work on the project as of January 1, 1956, but will maintain wages and conditions in effect on December 31, 1955, until a new agreement can be completed and that the wage policy will remain	Identified Tr. 657 Offered Tr. 657 Admitted Tr. 658

unchanged, etc. The letter proposes a meeting to be held on January 5, 1956, at Richland.

Plaintiff's Exhibits

Pl. Ex. 17:	Contract dated February 13, 1956, between Atomic Energy Commission and Richland School District 400, providing for payments to be made by the Commission to the School District for the maintenance of District Schools for the school year 1955-1956.	Identified Tr. 767 Offered Tr. 767 Admitted Tr. 767
Pl. Ex. 18:	Contract dated February 16, 1955, between Atomic Energy Commission and Richland School District 400, providing for payments to be made by the Commission to the School District for the maintenance of District Schools for the school year 1954-1955.	Identified Tr. 767 Offered Tr. 767 Admitted Tr. 767
Pl. Ex. 19:	Ordinance dated November 30, 1950, regulating traffic in Hanford Area with amendmnets dated June 6, 1955.	Identified Tr. 767 Offered Tr. 767 Admitted Tr. 768
Pl. Ex. 20:	Five letters dated May 26, 1943; November 8, 1943; January 4, 1944; August 16, 1944, and July 31, 1945, from Secretary of War to Governor of Washington.	Identified Tr. 778 Offered Tr. 779 Admitted Tr. 779

APPENDIX II

Chronological Statement of Events from December 31, 1946, When the Hanford Area Was Transferred from War Department to Atomic Energy Commission to May 8, 1956, When Appellee's Original Complaint Was Filed

The war in which the United States and the Allied Powers had been engaged having ended, Congress passed the original Atomic Energy Act effective as of August 1, 1946 (42 U.S.C.A. Sections 2011-2281). As authorized by that Act, the President on December 31, 1946, issued Executive Order 9816. By that order (42 U.S.C.A. p. 192) the properties and facilities known as "Manhattan Engineer District, War Department," while under the War Department, were transferred to Atomic Energy Commission. That Act contemplated that the transferred facilities should continue to be used for the production of war materials and for such civilian uses as research might develop.

On September 1, 1950, a labor contract (Defendants' Exhibit 4) was executed between Associated General Contractors of America, Inc., Spokane Chapter, and several local unions, including Operating Engineers Local 370 and Teamsters Local 839. Article I of this contract entitled "WORK AND TERRITORY AFFECTED" provided that it should cover heavy construction and engineering projects in fifteen counties, including Benton County and portions of three other counties lying east of the 120th Meridian in the State of Washington. This contract (Article II) remained in effect until December 31, 1956, when it was superseded by the two contracts now in litigation (Exhibits 2 and 3). This

contract of September 1, 1950, was never applied to construction work within the Hanford Atomic Energy project.

On September 29, 1952, the so-called "Hanford Works Agreement" was executed between a contractors group that became known as "Hanford Contractors Negotiating Committee" and Pasco-Kennewick Building Trades Council and a number of its affiliated local unions, including Operating Engineers Local 370 and Teamsters Local 839. This contract provided that it should be and remain in effect until January 1, 1954, and from year to year thereafter until cancelled by prescribed notice. This contract was applicable to construction work exclusively within the Hanford Area.

The Hanford Works Agreement of September 29, 1952, expressly provided for isolation pay. Isolation pay was an allowance of $2.62½ per day payable to workmen in addition to their other wages to compensate them, wholly or in part, for time spent in going to and from the actual work site within the Hanford barricade. The particular work site might be anywhere in the 625 square miles included within the exterior boundaries of the Hanford Atomic Energy Project. Bus transportation was not expressly provided for in the contract, but as Mr. Guess, Executive Secretary of Associated General Contractors (Tr. 347), and Mr. Knack, Director of Labor Relations of appellee (Tr. 300), as witnesses for the appellee explained, it was a recognized custom or usage that had prevailed for a long time and the elimination of which would reduce the workman's take-home pay (Tr. 329, 330).

Francis H. Bacon, a rebuttal witness for the appellee, became employed by the Atomic Energy Commission about ten years prior to the time he was testifying on June 18, 1957. That is, he became connected with the Hanford Atomic Energy Project shortly after it was transferred from the War Department to the Atomic Energy Commission. His official position was Deputy Director of Organization and Personnel Division and as such he was particularly concerned with contractor personnel and the working conditions of the various contractors on the project (Tr. 759-760). The project is about 600 square miles in extent and includes the City of Richland, which originally was a small village of about 240 people but has expanded into a city with a population of about 28,000. Richland is located at the southerly end of the project and is an open city. The plants are located north of Richland in a barricaded area and no one is permitted behind the barricade without security clearance (Tr. 761-762). Mr. Bacon explained how the so-called "Hanford Works Agreement" (Exhibit 6) came into existence. The Atomic Energy Commission was contemplating a further expansion program. There was some question as to what part of that program, if any, would be allocated to Hanford. In previous years the labor situation there had been a bit unsatisfactory. Mr. Knapp (of Pasco-Kennewick Building Trades Council) indicated to the Commission that if the program was given to Hanford he would put his house in order. Many local unions had drifted out of the Pasco-Kennewick Building Trades Council and his assurance to the Commission was that if a project agreement which embodied this further

construction work was reached he could assure the Commission that he could present a solid front to all of the unions operating in the construction industry. The objective was to work out an understanding between the unions and prospective contractors so that working conditions would be somewhat uniform and include representation of all unions normally engaged in construction work (Tr. 771-772). As a result of these commitments both by the unions and by Mr. Shaw (a representative of Atomic Energy Commission) language was adopted to make it an obligation of construction contractors to pay "as were determined to be prevailing by the Commission" (Tr. 773). The language contained in the Morrison-Knudsen contract relative to "prevailing wage rates and allowances" is substantially identical with that included in all construction contracts, except that in the Morrison-Knudsen contract there was added the words "during the life of the Hanford Agreement" (Tr. 773-774). With the exception of those added words the provision relative to prevailing wage rates and allowances was the standard clause in all other contracts after the effective date of the so-called "Hanford Works Agreement" (Tr. 774-775).

The contract (Exhibit 4) applicable to work outside the Hanford Area, and Exhibit 6, applicable to work within the Hanford Area, were contemporaneously in effect from their respective dates and until December 31, 1955. Both were in effect at the time the appellee became a member of the Associated General Contractors, Inc., Spokane Chapter, in February, 1955.

Before proceeding further with this chronological statement of events it is desirable, for a clear understanding of later events, to identify Mr. Kenneth M. McCaffree, who was called by appellee as a rebuttal witness (Tr. 725). Mr. McCaffree testified that as of the time he was testifying in June, 1957, he was thirty-eight years of age and since 1949 had been a Professor at the University of Washington in its Economics Department. He had a degree of Doctor of Philosophy in Economics from the University of Chicago granted in 1950. From March, 1953 until October, 1954, while on leave from the University, he served as Executive Secretary of the Hanford Contractors Negotiating Committee. He was never a member of that committee and, so far as the record shows, had no authority to speak for it after he ceased to be executive secretary in October, 1954. It does appear that for a time after he had ceased to be executive secretary he acted as a consultant for J. A. Jones Construction Company (Tr. 725-733). Nevertheless, he continued to use the stationery of the Hanford Contractors Negotiating Committee and represented himself to be its executive secretary.

On September 21, 1955 (Tr. 323 and 351), approximately one year after Mr. McCaffree had ceased to be executive secretary of the Hanford Contractors Negotiating Committee, he started an agitation to eliminate isolation pay and bus transportation. Two months later the appellee, on November 25, 1955, entered into its contract (Exhibit 1) with the United States Atomic Energy Commission for the construction of certain facilities in the Hanford Area for a lump sum of $1,869,-

580.00. Work under this contract was commenced on November 28, 1955, and continued until the work stoppage which commenced on March 22, 1956. Among other things, this contract provides (Section 32, page 10, under the caption, "PREVAILING WAGE RATES AND ALLOWANCES:"

> "During the life of the Hanford Works Agreement the contractor agrees to pay laborers and mechanics engaged in work hereunder at Hanford Works the scale of wages and allowances prevailing at Hanford Works, including all terms of any modification thereof as determined by the Commission ***."

On December 15, 1955, Mr. McCaffree, who had ceased to be executive secretary of Hanford Contractors Negotiating Committee in October, 1954, wrote a letter on the letterhead of that committee to International Union of Operating Engineers Local 370, enclosing a copy of a proposed memorandum agreement to be executed by that committee and various unions affiliated with Pasco-Kennewick Building Trades Council (Exhibit 12). This document proposed that: "The prevailing agreement on non-governmental construction work *in the territory surrounding the Hanford Project shall become effective on January 1, 1956, for corresponding work on the Hanford Project.*"

At the time this proposal was submitted the Teamsters contract of December 19, 1955 (Exhibit 2) and the Operating Engineers contract of December 24, 1955 (Exhibit 3) were in the process of negotiation. The earlier contract of September 1, 1950 (Exhibit 4) was still in effect. Mr. McCaffree made this proposal of December 15, 1955, because he knew that the existing con-

tract dated September 1, 1950 (Exhibit 4) had no application to the Hanford Area. If that were not the fact there would not have been any reason for making the proposal *italicized* above.

On December 19, 1955, the contract (Exhibit 2) between Associated General Contractors of America, Inc., Spokane Chapter, and Teamsters Local 839 was executed, and five days later on December 24, 1955 the contract (Exhibit 3) between Associated General Contractors of America, Inc., Spokane Chapter, and Operating Engineers Local 370 was executed. Teamsters contract (Exhibit 2) and Engineers contract (Exhibit 3) describe the same territory in the State of Washington to which they severally apply. Both contain the same description of territory and work covered (Exhibit 2, page 4; Exhibit 3, page 4), naming nineteen counties and parts of counties in the State of Washington east of the 120th Meridian, including the County of Benton. The description in the two later contracts is substantially identical with the description in the earlier contract (Exhibit 4) which the later contracts superseded, except that in the later contracts Chelan and Kittitas Counties are added. Neither Chelan nor Kittitas Counties is contiguous to the Hanford Area. The contract (Exhibit 4), which expired on December 31, 1955, had no application whatever to work within the Hanford Area. For that reason, if for no other, the two contracts (Exhibits 2 and 3), which superseded it on January 1, 1956, likewise have no application to the Hanford Area.

On December 29, 1955, Kenneth M. McCaffree, who at that time had ceased to be executive secretary of

Hanford Contractors Negotiating Committee, wrote a letter to Pasco-Kennewick Building Trades Council, including the two appellant Local Unions, on the letterhead of Hanford Contractors Negotiating Committee, stating that that committee was then exercising the right to terminate the Hanford Works Agreement of September 29, 1952, as of December 31, 1955.

The first paragraph of this letter states that the notice then being given was in accordance with a letter of October 28, 1955, but no letter of that date is in evidence. The letter of December 29, 1955 (Exhibit 16) states specifically:

> "The Hanford Contractors will not stop work on the project as of January 1, 1956. The contractors will maintain wages and conditions in effect on December 31, 1955, until a new agreement or agreements between the Contractors and the Unions involved can be completed."

The third paragraph of the letter states:

> "The wage policy of the project will remain unchanged. In accordance with past practice the Committee is willing to accept those wage scales and effective dates which currently have been negotiated by a particular craft or crafts and the association with which those unions normally negotiate, and which are prevailing in the area surrounding the project. These wages can be placed into effect as soon as agreements are completed between the Hanford Contractors and the respective union or unions."

On January 1, 1956, the new contracts between Associated General Contractors of America, Inc., Spokane

Chapter, and Teamsters Local 839 and Operating Engineers Local 370 (Exhibits 2 and 3) took effect.

In the letter dated December 29, 1955 written by Kenneth M. McCaffree, as executive secretary of Hanford Contractors Negotiating Committee, giving notice of a conditional cancellation of the Hanford Works agreement as of December 31, 1955, he proposed a meeting to be held on January 5, 1956, at Richland. Two meetings were held on that day. The first meeting—that suggested by Mr. McCaffree—was held in the forenoon at Richland and was attended by Lee J. Knack, appellee's Director of Labor Relations, accompanied by Ramon E. Reed, who had recently become appellee's Project Manager at Hanford. They attended the Richland meeting at the instance of Mr. Thurston of the Atomic Energy Commission (Tr. 702). The other meeting was held at Pasco on the afternoon of the same day. The Pasco meeting was the customary pre-job conference, at which Mr. Knack and Mr. Reed were present as representatives of the appellee for conference with the business agents of the various unions affiliated with the Pasco-Kennewick Trades Council whose members were then, or during the progress of the work, might become interested in the appellee's construction project. At both meetings the matter of continuing isolation pay and bus transportation was discussed. At the Pasco meeting in the afternoon Mr. Knack definitely committed the appellee to a continuance of isolation pay and bus transportation. Because of the importance of Mr. Knack's participation in that pre-job conference, we are printing an Appendix IV, a complete abstract

of the evidence relating to the commitment of Mr. Knack made at that meeting.

Following the pre-job conference at Pasco on January 5, 1956, at which Mr. Knack committed Morrison-Knudsen to continue isolation pay and bus transportation, Mr. McCaffree, on January 13, 1956, wrote another letter on the letterhead of Hanford Contractors Negotiating Committee which he signed as Executive Secretary (Exhibit 13). This letter states that the wage rates effective as of January 1, 1956, in the Operating Engineers contract (Exhibit 3) can not be placed in effect in the Hanford area "until a new agreement has been signed." The letter enclosed a proposed form of agreement referring specifically to the Operating Engineers contract of December 24, 1955 (Exhibit 3) which, if executed, would make that contract applicable to the Hanford Project with some exceptions. This letter and the appended proposed memorandum agreement make it entirely clear that the Hanford Contractors Negotiating Committee, represented by Mr. McCaffree (if he did in fact then represent that committee) knew that the Associated General Contractors new contracts which became effective January 1, 1956, were not applicable to the Hanford Area and could not be made applicable to that area in the absence of an agreement such as he then proposed. Mr. McCaffree not only signed this letter of January 13, 1956, as Executive Secretary, but also signed the enclosed proposed memorandum of agreement as a "member" of Hanford Contractors Negotiating Committee. On the trial he admitted that he never had been a member of that Committee (Tr. 727).

On March 2, 1956, Mr. McCaffree wrote another letter (Exhibit 15) on the letterhead of Hanford Contractors Negotiating Committee to Teamsters Local 839, which he signed as Executive Secretary.

Exhibit 14 is a proposed memorandum of agreement submitted to Operating Engineers Local No. 370 on behalf of Hanford Contractors Negotiating Committee. This is dated "this.....day of March, 1956." This is another proposal submitted in the name of Hanford Contractors Negotiating Committee to Operating Engineers Local 370 substantially identical with Exhibit 13, except that Exhibit 13 proposed that certain allowances should not apply on the Hanford Area until June 30, 1956, whereas this later proposal (Exhibit 14) states that these provisions should not apply until March 12, 1956. Both these proposals (Exhibits 13 and 14) make it entirely clear that so far as Hanford Contractors Negotiating Committee was concerned the Operating Engineers contract of December 24, 1955 (Exhibit 3), as written, had no application to the Hanford Area.

On March 8, 1956, Mr. McCaffree, still representing himself to be Executive Secretary of Hanford Contractors Negotiating Committee, wrote a letter to Associated General Contractors of America, Inc., Spokane Chapter, with copies to Teamsters Local 839 and Operating Engineers Local 370, reading:

> "Effective March 9, 1956, those bargaining rights which have been held by the Hanford Contractors Negotiating Committee on behalf of contractors working on the Hanford Project are hereby assigned to the Associated General Contractors Chapters in Spokane on the basis of individual con-

tractor membership in the respective Chapters. These bargaining rights apply to the negotiations with the unions listed below."

Shortly after this letter was transmitted Mr. McCaffree disappeared from the scene until fifteen months later he reappeared as a rebuttal witness for the appellee (Tr. 725). On the trial Mr. Sam C. Guess, Executive Secretary of Spokane Chapter of Associated General Contractors, said that when he received this rather remarkable letter he was "completely flabbergasted," because, as he said, "it was an ambiguity in the grossest sense" (Tr. 381-382). Mr. Guess meant, as obviously was the fact, that by this letter Mr. McCaffree could not change the relationship existing between Associated General Contractors of America, Inc., and the unions —parties to the two contracts (Exhibits 2 and 3) which became effective on the preceding January 1, 1956. Mr. Guess' confusion is easily understandable. However that may be, it is evident that Mr. McCaffree and Mr. Guess at that time were in complete agreement that the contracts which but recently had become effective on January 1, 1956 (Exhibits 2 and 3), as written, had no application to the government work then being performed by the appellee in the Hanford Area.

Whatever notion Doctor McCaffree at that date may have entertained relative to the elementary rules of agency, it is plain that his attempted "assignment of bargaining rights" on March 8, 1956, could not effectively operate to make the two contracts as written and in effect on January 1, 1956, retroactively applicable to the Hanford Atomic Energy Project.

On March 10, 1956, Associated General Contractors of America, Inc., submitted a written document entitled "Hanford Project Proposal" to Operating Engineers Local 370 and Teamsters Local 839 (Exhibit 7). It proposed an "Addendum" (according to the dictionary an addendum is an amendment) to the existing A.G.C. agreements to be effective March 12, 1956, making the provisions of the A.G.C. agreements (Exhibits 2 and 3) applicable to the Hanford Project with two exceptions. The exceptions proposed were:

> "A travel allowance of $2.62½ per day will be paid on all A.E.C. contracts for the period March 12 to December 31, 1956.
>
> "On January 1, 1957, there will be placed into effect the 1958 travel provisions of the A.G.C. agreements which will continue through the years 1957-1958."

The effect of the first exception would be to continue isolation pay of $2.62½ per day until December 31, 1956. The effect of the second exception would be that on January 1, 1957, certain travel provisions of the existing A.G.C. agreements would continue through the years 1957-1958. If the Unions had agreed to this proposal the effect would have been to continue isolation pay for a time, but bus transportation would be completely eliminated. This is a vital document bearing upon the question whether or not the labor contracts (Exhibits 2 and 3) in effect since January 1, 1956, were or were not intended to be applicable to work being carried on within the Hanford Area. As this Exhibit 7 discloses, this proposal was voted on on March 14, 1956, by

the Teamsters and rejected, and it was also rejected by the Engineers.

Mr. Guess, on his direct examination as a witness for the appellee, testified that the acceptance of this proposal by the Unions would have meant a modification of Exhibits 2 and 3. He further testified that at a meeting between the representatives of the Unions and the representatives of the contractors on March 16, 1956, this proposal was definitely turned down by both the Teamsters and the Operating Engineers. After that refusal of the Unions to agree to the proposed amendment a recommendation was made to the contractors then working at the Hanford Works, which, of course, included the appellee Morrison-Knudsen, Inc., to continue to pay isolation pay and furnish buses until such time as an agreement could be reached (Tr. 332-333). If, as the appellee is now claiming, the two contracts, as written and in effect on January 1, 1956, were applicable to work being performed in the Hanford Area, why was the Associated General Contractors on March 10, 1956—sixty-eight days later—seeking an amendment to the contracts as written for the sole purpose of making those contracts applicable to the Hanford Area? The appellee's entire case is founded upon the contention that the two labor contracts (Exhibits 2 and 3), as written and effective on January 1, 1956, by their very terms were applicable to work in the Hanford Area. If it be assumed that there is any merit whatever in appellee's contention, which, of course, the appellants do not admit, then the definite, unequivocal and final rejection of the proposal evidenced by this Exhibit 7 was a re-

pudiation of the appellants' contractual obligations, and by reason of that repudiation, the appellee then became an "offended party" as defined by Article IX of Teamsters contract (Exhibit 2) and Article X of Engineers contract (Exhibit 3). This matter is argued as Point III(C).

On the morning of March 23, 1956, the members of the appellant Unions reported for work as usual at the North Richland Terminal, but the appellee failed to have buses available for their transportation to the work sites and they had no alternative but to go home. A work stoppage ensued which continued until June 6, 1956. The basis of appellee's claim is that this work stoppage was an illegal strike in violation of Article VII of the Teamsters contract (Exhibit 2, page 10) and Article VIII of the Engineers' contract (Exhibit 3, page 9), both of which, in identical language, prohibit strikes and lockouts. The appellee now says when the workmen went home because no buses were made available to them their action constituted an unlawful strike. The appellants say that the men went home because of a lockout resulting from appellee's action in summarily discontinuing the usual bus service.

Under date of March 30, 1956, Sam C. Guess, as Executive Secretary of Associated General Contractors of America, wrote a letter (Exhibit 8) to Art Rossman of Operating Engineers Local 370, referring to the work stoppage then existing, to which Mr. Rossman replied by a letter dated April 3, 1956 (Exhibit 9).

When the appellee persisted in its refusal to furnish

bus service, the job was picketed on April 5, 1956 (Tr. 409).

Under date of April 27, 1956, the lockout, then having existed for thirty-five days, appellee's attorneys, Allen, DeGarmo & Leedy, wrote a letter to the two appellant Unions concerning the dispute. This letter was attached to the original complaint as Exhibit C and by reference made a part of the amended complaint. The fourth paragraph of that letter stated:

> "Morrison-Knudsen Company, Inc., as a member of the Associated General Contractors of America, Inc., Spokane Chapter, has at all times since January 1, 1956, recognized said Agreements heretofore mentioned as being in force and effect with your organizations and your members, applicable to the work being performed by it at the Hanford Atomic Products Operation, * * *."

As a matter of convenience for reference, a photostatic copy of this letter was offered and received in evidence as Exhibit 50. Notwithstanding the claim in the letter that the appellee recognized the agreements referred to as being in force since January 1, 1956, and applicable to the Hanford Area, Mr. Knack, the appellee's Labor Relations Director, who cooperated with appellee's attorneys in composing the letter, admitted on the trial that until the date of that leter, so far as he knew, no one directly representing Morrison-Knudsen had ever made any claim that the contracts, as written and in effect on January 1, 1956, were applicable to the appellee's work in the Hanford Area (Tr. 297-299). After that admission by Mr. Knack nothing more was heard of this letter, which appellee's counsel must have

thought was important when they made it an exhibit to their original complaint.

The letter last referred to no doubt was written for strategic or disciplinary purposes preliminary to the filing of a damage action. Accordingly, the original complaint was filed on May 8, 1957, forty-seven days after the lockout first occurred. In that complaint the appellee alleged damage accrued to April 30, 1956, in the sum of $638,500.00, together with additional damage of not less than $13,000.00 per day during the period that the lockout might continue beyond that date.

APPENDIX III

The Labor Contracts Must Be Construed in the Light of the Circumstances Surrounding the Parties When the Contracts Were Being Negotiated

In *Merriam v. United States,* 107 U.S. 437, page 441, 27 L.ed. 531, page 533, the court said:

> "It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." (Citing cases)

In *C. R. I. & P. R. Co. v. Denver, etc.,* 143 U.S. 596, page 609, 31 L.ed. 277, page 281, the court said:

> "There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed."

In *United States v. Bethlehem Steel Company,* 205 U.S. 105, page 117, 51 L.ed. 731, page 736, the court specifically held that the Parol Evidence Rule is inapplicable to such situations:

> "It is objected on the part of the company that, as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or to documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a

written contract between the parties is referred to, and it is insisted that, under that rule, the various letters passing between the parties prior to the execution of the contract are not admissible.

"The rule that prior negotiations are merged in the contract is general in its nature, and, we think, does not preclude reference to letters between the parties prior to the execution of the contract in this case. The language employed in this contract for a deduction, in the discretion of the Chief of Ordnance, of $35 per day from the price to be paid for each day of delay in the delivery of each gun carriage, respectively, taken in connection with the subject-matter of the contract, leaves room for the construction of that language in order to determine which was intended, a penalty or liquidated damages. While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract. (Citing cases)

"It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that, in cases of doubt as to the meaning of language actually used, prior negotiations may sometimes be referred to."

The applicable rule is concisely stated in 17 C.J.S., page 744, Title Contracts, Section 321, as follows:

> "Where the language of a contract is susceptible of more than one interpretation, but not otherwise, the court, in ascertaining the intention of the parties, may and should consider, and construe the contract in the light of the situation and relation of the parties and the circumstances surrounding them at the time of making the contract, the nature and situation of the subject matter, and the apparent purpose of making the contract."

To support the quoted text the editors cite numerous Federal cases, together with several hundred cases from appellate courts of thirty-eight states, including Washington.

Among the decisions in which the Supreme Court of Washington has recognized and applied the rule are:

Griffin v. Lear, 123 Wash. 191, 212 Pac. 271;

Leavenworth State Bank v. Cashmere Apple Co., 118 Wash. 356, page 361, 204 Pac. 5;

Vance v. Ingram, 16 Wn.(2d) 399, page 411, 133 P.(2d) 938;

Skaug v. Gibbs, 39 Wn.(2d) 269, page 270, 235 P.(2d) 154;

Kelly v. Valley Construction Co., 43 Wn.(2d) 679, page 688, 262 P.(2d) 970;

Williston on Contracts, Vol. 3, Section 629.

APPENDIX IV

Abstract of Evidence Concerning Commitment to Continue Isolation Pay and Bus Transportation Made by Lee J. Knack, Appellee's Director of Labor Relations, at Pre-Job Conference Held at Pasco on January 5, 1956

Mr. Knack, appellee's Director of Labor Relations, on direct examination by appellee's counsel, testified that he was familiar with the provisions of the contract between Morrison-Knudsen Company and United States Atomic Energy Commission which obligated Morrison-Knudsen to abide by the provisions of the Hanford Works agreement as long as it was in existence (Tr. 209).

On cross-examination by counsel for Operating Engineers Local 370 Mr. Knack said that at the time his company became a member of Associated General Contractors in February, 1955, he was aware of the then existing contract (Defendants' Exhibit 4) between Associated General Contractors and the various unions, including the two defendants (Tr. 217). He also knew of the provisions of the Hanford Works agreement (Tr. 223-224) and that it was in effect when his company bid the job (Tr. 236). He understood that the references to "allowances" which appellee's contract with the Atomic Energy Commission required it to maintain included isolation pay and bus transportation (Tr. 237). He learned of Mr. McCaffree's letter of December 29, 1955 (Exhibit 16) on January 4, 1956 —the day before the Richland and Pasco meetings (Tr. 238). The status of the Hanford Works agreement came up for discussion at both the meetings on January 5, 1956 (Tr. 240-241). At the morning meeting

there was considerable discussion pertaining to the Hanford Works agreement and it was impossible for him to tell whether or not the Hanford agreement, from a practical standpoint, was totally and completely terminated. On January 4, 1956, Mr. Knack had learned of the communications concerning the technical termination and that matter "was definitely one that was up in the air at the time we had our meeting on the 5th of January" (Tr. 244). Mr. Knack said that at that time, as far as he was concerned, he had no indication that the Hanford Works agreement had ceased to exist. He said it was a moot question. The appellee's work at Hanford had commenced before the meetings on January 5, 1956, and from the commencement of the work until March 22, 1956, Morrison-Knudsen furnished bus transportation to the defendant Unions in accord with the provisions of the Hanford Works agreement (Tr. 246).

On cross-examination by counsel for Teamsters Local 839 Mr. Knack testified that Mr. Henry Thurston of the Atomic Energy Commission was present at the meeting at Richland on the morning of January 5, 1956 (Tr. 272). Mr. Knack had learned of the proposed Richland meeting the day before from Mr. Thurston and he was vitally interested because not long before his company had entered into the contract with Atomic Energy Commission. Representatives of the Atomic Energy Commission, the contractors and labor unions were present. There was discussion concerning bus transportation and isolation pay. The afternoon meeting was held in the Labor Temple in Pasco. That meeting had been requested by Morrison-Knudsen some time

in the middle of December (Tr. 279-280). That afternoon meeting was a pre-job conference arranged after Morrison-Knudsen knew it was going to do the work under its contract of November 25, 1955. Representatives of the Local Unions were present whose members might be employed. Mr. Knack definitely recalled that Mr. Knapp was present (Tr. 281-282). Mr. Knack was asked the direct question if it was not a fact that at the Pasco meeting he was asked by Mr. Knapp as to what Morrison-Knudsen proposed to do about continuing to pay isolation pay and furnishing bus transportation (Tr. 294). Mr. Knack answered that he did not recall whether the question was put to him by Mr. Knapp or not

> "but the question was put to me as to what our position was in relation to the payment of isolation pay and the continuing transportation as the matter stood at that moment. In other words, there was no question asked of me as to how we were going to operate through to the completion of our work on that project, and because of my contact with the morning session as an observer, in which it was indicative of the fact that these people who had been negotiating previously and were still discussing matters between themselves, that they were endeavoring to arrive at some sort of a solution of their problems, and that on that basis, *that we of the Morrison-Knudsen Company were not going to be the people who were going to discontinue that practice;* in view of the fact that other contractors there were continuing the practice, were still paying the pay, that it was unrealistic to believe that we could do so and employ people under those competitive conditions." (Tr. 295)

On re-direct examination by appellee's counsel Mr. Knack said that the furnishing of bus transportation was an established practice on the Hanford Works (Tr. 300).

Sam C. Guess, Executive Secretary of the Spokane Chapter of Associated General Contractors, Inc., who, on behalf of that organization, executed the two labor contracts (Exhibits 2 and 3) with Teamsters Local 839 and Operating Engineers Local 370, was examined as a witness on behalf of the appellee. He testified that he was familiar with the history of the practice or custom of furnishing bus transportation (Tr. 319). In answer to some questions propounded by the court Mr. Guess said that the main entrance into the reservation is through North Richland and that most of the workmen enter the project through the North Richland barrier. Some of the workmen drive their own private cars into the barricaded area and about forty per cent of them ride the buses. The area is large, the distance from North Richland to the Moxee entrance being in excess of thirty-five miles (Tr. 318-320). Referring to the time after the two Associated General Contractors agreements (Exhibits 2 and 3) became effective on January 1, 1956, Mr. Guess said that because of the urging of the Atomic Energy Commission's staff, and Mr. Thurston in particular, the contractors working behind the barrier did nothing to upset the conditions because of the very critical nature of the work going on (Tr. 327-328). The matter under discussion at the time referred to was the amount of take-home pay which would possibly be changed by going under the

Spokane Chapter agreements. If the conditions under which Hanford had been working were terminated the workmen would no longer be paid isolation pay or furnished bus transportation, and to eliminate one or the other would make some difference in the amount of money that a man could take home (Tr. 329-330). Mr. Guess then stated that Mr. Rossman (Business Manager of Operating Engineers Local 370) was demanding the continuance of isolation pay and bus transportation (Tr. 331). Mr. Guess had become Executive Secretary of the Spokane Chapter of Associated General Contractors on January 20, 1954 (Tr. 313) and it came to his knowledge that bus transportation was being furnished and isolation pay was being paid to workmen employed inside the barricade (Tr. 346). The provision for isolation pay was in the written contract (Hanford Works agreement). The furnishing of buses was a usage that had grown up (Tr. 347).

In the middle of December, 1955, Ramon E. Reed became Project Manager for the appellee at Hanford and in that capacity was its Chief Officer in Charge of the Project (Tr. 403). He accompanied Mr. Knack to the meetings at Richland and Pasco on January 5, 1956 (Tr. 405). On cross-examination by counsel for Operating Engineers Local 370 Mr. Reed was asked as to his recollection of a conversation at the pre-job conference on the afternoon of January 5, 1956, at Pasco between Mr. Knapp (representative of the Unions) and Mr. Knack (appellee's Director of Labor Relations) concerning the continuance of isolation pay and bus transportation. Mr. Reed said that he did remember that there was a discussion along those lines but he did not

remember the "exact wording" (Tr. 416-417). It is not surprising that Mr. Reed could not remember the "exact wording" inasmuch as he was testifying on June 12, 1957—about seventeen months after the date of the conversation between Mr. Knapp and Mr. Knack and he, Mr. Reed, was not the spokesman for the appellee.

Charles J. Knapp was called as a defense witness (Tr. 469). At the time in question he was Secretary of the Pasco-Kennewick Building Trades Council and representative of the Plasterers and Cement Finishers Union. He had been familiar with the labor situation at Hanford since 1943. He had arranged for the meeting with representatives of Morrison Knudsen which was held on January 5, 1956 (Tr. 476). At that meeting there were present representatives of about fifteen individual crafts, including William Dunn and Arthur A. Rossman of the Operating Engineers; Sewell Davis of the Teamsters; Edwards Clary of the Painters Local Union, and Lawrence R. King of the Millwrights (Tr. 476-477). The Pasco meeting was the usual pre-job conference held when a major job is being started, so that representatives of the Unions and the employer might discuss matters relating to manpower needed and various phases of the contractor's work (Tr. 477). Mr. Knapp testified that there were two matters concerning which he was particularly interested and these were what the company intended to do in reference to furnishing transportation and the payment of isolation pay. He discussed two points with Mr. Knack. Mr. Knapp was spokesman for the union group and he was the one who asked the question of Mr. Lee Knack:

"Q. All right, and when you asked the question, did you direct it to Mr. Knack?

A. Yes.

Q. And what did he say?

A. He said that they would pay isolation pay and continue to furnish transportation. He said that the Morrison-Knudsen Company had bid the job planning on paying isolation pay and furnishing bus transportation; that was the way they figured the job." (Tr. 479-483)

Mr. Knapp was cross-examined at some length with particular reference to his discussion with Mr. Knack and said that he remembered distinctly that at the time there was considerable disquiet about a continuance of the Hanford Works agreement and Mr. Knack said "that he was not interested in what other contractors were going to do. He said that they had bid the job on isolation pay and free bus transportation and they were going to do it. They were going to do the job. He said they were particularly interested in coming in, getting the job done and getting out again" (Tr. 525-529).

William H. Dunn, Field Representative of Operating Engineers Local 370, was present at the Pasco prejob conference on the afternoon of January 5, 1956. Mr. Dunn testified:

"A. Well, the meeting progressed along, it was just about ready to break up, in fact, some of the fellows had started getting up from the table, and Mr. Knapp said to Mr. Lee Knack, 'I got a question I want to ask you,' and he asked him what was going to be their position pertaining to isolation

> pay and free bus transportation, and Mr. Knack's reply to him was, 'We bid this under the Hanford Works agreement and we are going to do the job under that.' In those words, that is what the man meant." (Tr. 560)

On cross-examination by counsel for appellee Mr. Dunn repeated, in substance, what he had testified to on direct examination, but qualified it to the extent that Mr. Knack may have said that they were not willing to enter into an arrangement for the duration of the job unless the Unions were willing to do likewise" (Tr. 564).

Arthur A. Rossman, Business Manager of Operating Engineers Local 370, testified on direct examination that he was present at the Pasco pre-job conference on the afternoon of January 5, 1956, that there were representatives of about fifteen unions present in addition to the two men—Mr. Knack and Mr. Reed—representatives of Morrison-Knudsen (Tr. 612-613). Near the end of that meeting Mr. Knapp asked what the company's intention was with regard to bus transportation and isolation pay (Tr. 616). Mr. Rossman said that while he would not undertake to quote Mr. Knack verbatim the substance of his statement was as related by Mr. Knapp (Tr. 621-622). Mr. Knapp was speaking for his own Union—Cement Finishers—as well as for Operating Engineers Local 370 and Teamsters Local 839, and if Mr. Knapp had not asked the question Mr. Rossman would have done so (Tr. 623).

On cross-examination by appellee's counsel Mr. Rossman said that Sewell Davis (Teamsters Representative) was present at the Pasco meeting but that "I

know Mr. Charlie Knapp spoke for all of us'' (Tr. 629). Mr. Knapp said he was representing the Pasco-Kennewick Building Trades Council and the affiliated unions (Tr. 635).

Harold Edward Clary, the Business Representative of Painters Local Union 427, was present at the Pasco pre-job conference on January 5, 1956. He said that toward the completion of that meeting Mr. Knapp and Mr. Knack conferred, that the matter of isolation pay and bus transportation was discussed and the substance of the conversation was that Mr. Knack said ''that they weren't desirous of upsetting anything or establishing any precedent'' (Tr. 669-671).

Lawrence R. King, Business Representative of Millwrights and Machinery Erectors, Local Union 1699, was present at the Pasco meeting on January 5, 1956. His Union was affiliated with the Pasco-Kennewick Building Trades Council. Towards the end of that meeting Mr. Knapp asked what Morrison-Knudsen Company's position was going to be as to bus transportation and isolation pay. Mr. Knack answered to the effect that they weren't there to disrupt anything that had been going on and that he would continue to pay it (isolation pay) and furnish transportation (Tr. 672-675).

The defendants having rested, Mr. Lee J. Knack was examined by the appellee as a rebuttal witness. On direct examination (Tr. 700) he said that he was present at the morning meeting of January 5, 1956, at Richland. He and Mr. Reed, the Project Manager, were asked to attend that meeting specifically by Mr. Thur-

ston of the Atomic Energy Commission and they did attend as observers (Tr. 702). He and Mr. Reed attended the afternoon meeting at Pasco (Tr. 705). That meeting lasted about three hours and various matters were discussed (Tr. 706). Mr. Knack's direct examination on rebuttal then continued as follows:

"There was also the question that was posed as to the circumstances relating to the practice that prevailed in the area of the payment of transportation or furnishing transportation and isolation pay.

Q. All right, now, on that subject, Mr. Knack, I want to ask you specifically, you were present in court during the testimony of Mr. Dunn and Mr. Rossman and Mr. Clary. Without asking you to either dispute or approve what they said, I wish you to tell the Court now your recollection of exactly what question was asked you and what answer you gave to the question concerning the question of bus transportation and isolation pay.

A. Well, the question was put to me about the payment of bus—or furnishing of bus transportation and the payment of isolation pay, and my first and immediate reaction to it was that certainly I didn't think that it was fair for the—

Q. I want you to state what you said, not what your reaction was.

A. Well, I said this, this is what I said. This was my—when I said reaction, I should have said response. I said that it was not fair for the people there to figure that they could use the Morrison-Knudsen Company as the solution to their problem or as a wedge when they had the problem with other contractors; that we certainly were not there

to either be the solution to problems, nor to establish or break precedents, as the case may be; that their problems had to be dealt with with the people with whom they had the problem, and that insofar as the conditions and circumstances were involved, that we were not—I was not going to tell them that we were going to discontinue furnishing the transportation or paying the isolation pay but that certainly there was a problem there that I didn't know when that problem was going to be answered, nor did I know how it was going to be answered, and, therefore, I felt that they were attempting to get the solution to the problem from me when I was not the party nor my company was the people who could solve the problem for them.

Q. Had you learned of this problem in the morning meeting at which Mr. Rossman and these other parties were present?

A. Yes.

Q. I want to ask you specifically, Mr. Knack, what information, if any, you had at the time as to the basis upon which Morrison-Knudsen Company made its bid for the Hanford Works Contract?

A. I had no knowledge as to how that job was specifically bid at that time.

Q. Why did you have no knowledge?

A. Well, the explanation for that, sir, requires a little bit of explanation of the relationship of how I function within the Labor Relations Department for the company.

Our company is set up in divisions and districts, and it is my job to service the various divisions and districts upon request. One of the services that my office furnishes to those divisions and districts is

labor information on prospective jobs which are to be bid. At again by request of the district or division, will send me a form which we have and request me to fill in the form on the various crafts or classifications, and so forth. This job having been bid out of our Seattle District, I had not been requested to furnish the information, the labor information, for the bidding of this particular job.

Q. Then, as of the date of this meeting on January 5th, 1956, what information did you have as to whether bus transportation or isolation pay had or had not been included in any bid estimate?

A. I would have no information of that at all at that time.

Q. I wish to ask you the specific question, Mr. Knack, as to what statement you made at this meeting as to the Morrison-Knudsen Company having bid this job on the basis of paying isolation pay and furnishing bus transportation?

A. There was some discussion as to how we may have bid the job and that resulted in my pointing out that the question of how we bid jobs and how we are going to operate those jobs is one that I would be quite interested in going into in a deeper vein in all areas, and pointed out that I had never yet been approached by any organized labor that would sit down at the time we were figuring a job or after we had figured a job and would agree to complete the job as we had bid it; that constantly we were confronted with the problem of bidding jobs and during the course and life of that job being confronted with rising costs of wage increase, labor costs, and so forth, and I made reference to that situation and pointed to one of the incidents that had occurred, a negotiation that I had

just come off of where that was highlighted, Table Rock Dam down in Missouri, and spent some time explaining the situation about bidding jobs and the relationship as to how they are bid and the costs after we get them.

Q. I wish to ask you, Mr. Knack—I am reading now from a transcript of Mr. Knapp's testimony —if at this meeting you made this statement:

'He said they would pay isolation pay and continue to furnish transportation. He said that the Morrison-Knudsen Company had bid the job planning on paying isolation pay and furnishing transportation; that was the way they figured the job.'

A. No, I did not.

Q. I am reading to you now from a transcript of the testimony of Mr. William H. Dunn. I wish to ask you if at this meeting on the 5th of January, 1956, you made this statement in response to the question which Mr. Knapp states he asked you:

'We bid this under the Hanford Works Agreement and we are going to do the job under that.'

A. I did not.

Q. Did you make any statement, Mr. Knack, other than as you have just testified here?

A. In relation to—

Q. In relation to that particular subject?

A. Not—insofar as words are concerned, the substance of what was said is what I have testified to." (Tr. 708-712)

It will be noticed that on his direct examination by appellee's counsel Mr. Knack was asked if he used the exact words imputed to him by Mr. Knapp and Mr.

Dunn and his answer was "Not—insofar as words are concerned."

On cross-examination by counsel for Operating Engineers Local 370 Mr. Knack admitted that he said they were not there to solve or to break precedents and that concerned bus transportation and isolation pay. He understood that that was an important matter (Tr. 713).

"A. They asked me the question, yes, they brought it up for discussion.

Q. Well, when they asked you that question, whether you were going to do it or whether you were not going to do it, did you tell them one way or the other what you were going to do?

A. I indicated that under the circumstances that I was going to tell them that at the time we were not going to discontinue the furnishing of the transportation and the payment of isolation pay.

Q. What did you say then, that you were not going to discontinue isolation pay or bus transportation?

A. As of that time?

Q. Yes, as of that time?

A. That is correct.

Q. What did you tell them, as of the 5th?

A. Of what time did I tell them what, sir?

Q. Yes, you say now that what you told them was you were not going to discontinue the isolation pay and you were not going to discontinue the bus transportation?

A. That is correct.

Q. Well, did you say, did you qualify that and

say 'Now' or 'Until the end of this job' or 'Halfway through this job?' How did you qualify that, if you did qualify it?

A. I didn't qualify it.

Q. I see. Then, what you said was, 'We are not going to discontinue it'?

A. 'At this time.'

Q. I see. 'At this time'?

A. Yes.

Q. In other words, now—

A. Indicating and going on to the point that they had the problem with the other people there and the question of the isolation pay and the bus transportation insofar as future was concerned was a problem for them to solve with the people with whom they had been dealing and the other contractors.

Q. Well, didn't they ask you whether you were going to continue this on your contract? Isn't that what you said?

A. They wanted to know if we were going to pay it—

Q. Yes.

A. —at that time, certainly.

Q. Yes. And you said you were?

A. Yes, I said that we were not going to discontinue it at that time." (Tr. 714-715)

On cross-examination by counsel for Teamsters Local 839 Mr. Knack repeated that he attended the morning meeting at Richland as an observer, but that he went to the area specifically to participate in the afternoon meeting at Pasco, that was the purpose of

his visit (Tr. 719). He learned of the problem through conversations with Mr. Thurston of the A.E.C. (Tr. 721).

"Q. Well, isn't it a fact, Mr. Knack, that what you meant, or the view you intended to express, in that meeting representing Morrison-Knudsen, you did not want to be forced into a position, at the instance of other contractors or anybody else, which would put you in conflict with the unions on the job then in progress?

A. I don't think I expressed it that way, Mr. Carey. To me, having come into the area and not having had some, at least, current background of the circumstances and conditions, I was aware only of the fact that there was a problem there that may have been involved in meetings, and so forth, I was totally unaware of it, and in my conversations with Mr. Thurston the morning before we met with the unions, Mr. Thurston requested the Morrison-Knudsen Company to continue paying the isolation pay and the furnishing of bus transportation. At the time, I asked him if that was an official request. He said, because of the circumstances, he could only make it as an unofficial request. That was part of the circumstances.

MR. CAREY: Well, will you read my question again? (Question read)

Q. (By MR. CAREY): Isn't that, in substance, the position you took?

A. Well, sir, when you asked the questions about being forced by other contractors, I felt no factor of force by other contractors at all.

Q. Well, isn't that, in substance, what you meant when this morning you said you didn't want to be

used as a wedge, when last Monday or a week ago Monday you said you didn't want to get 'in the bite of the line'? Isn't that, in substance, what you meant?

A. Well, in substance, what I meant, sir, was that I didn't want to be—our company to be the people who were going to lead the way and be put in a position—as a newcomer to the work, we had not been involved in these things in the past, our position was somewhat different from other contractors, substantially different, as a matter of fact, and that I didn't want my company being the company that was going to be the party to come into that area and cause conditions, either to the area or to ourselves—

Q. That is, you didn't want to disrupt a working arrangement that had been in existence for some considerable time?

A. At that particular time, in view of the conversations that I had had with Mr. Thurston, I felt that it was expedient for our company, even though the request had been unofficial, under the circumstances, to abide by that request." (Tr. 721-723)

APPENDIX V — EXHIBITS INTRODUCED ON TRIAL OF ISSUE OF DAMAGE

. x. 21:	Construction Status Chart of "F" Area, showing estimated cost $908,380.00, dated 1/20/56.	Identified Tr. 787 Offered Tr. 800 Admitted Tr. 800
. x. 22:	Construction Status Chart for "H" Area, showing estimated cost $868,800.00, dated 1/20/56.	Identified Tr. 791 Offered Tr. 800 Admitted Tr. 800
. x. 23:	Revenue Tabulation covering period December, 1955-March, 1957, inclusive.	Identified Tr. 792 Offered Tr. 800 Admitted Tr. 800
. x. 24:	Graph showing schedules and production.	Identified Tr. 794 Offered Tr. 800 Admitted Tr. 800
. x. 25:	Statement purporting to show delay of ninety-eight days chargeable to strike.	Identified Tr. 797 Offered Tr. 800 Admitted Tr. 800

Pl. Ex. 26:	Statement showing overhead, salaries during strike period amounting to $13,389.00.	Identifi Tr. 80 Offere Tr. 80 Admitt Tr. 80
Pl. Ex. 27:	Statement concerning Item 3 "Transportation of Key Personnel for protection of property, and so forth.	Identifi Tr. .... Offere Tr. .... Admitt Tr. 10
Pl. Ex. 28:	Statement concerning Item 11 relating to costs of re-employing men to pre-strike level. Amount claimed $896.01.	Identif Tr. .... Offere Tr. .... Admitt Tr. 8
Pl. Ex. 29:	Calculation concerning equipment rentals, Item 8. Total claimed $27,043.13.	Identif Tr. 8 Offer Tr. 8 Admit Tr. 8
Pl. Ex. 30:	Statement concerning Item 12 "General Administrative Expense." Amount claimed $19,257.00.	Identi Tr. 8 Offer Tr. 1 Admit Tr. 1
Pl. Ex. 31:	Statement concerning Item 13, extra-strength concrete. Amount claimed $675.75.	Identi Tr. 8 Offer Tr. 8 Admi Tr. 8

32:	Statement concerning Item 14 "Wage Increase After January 1, 1957." Amount claimed $2,284.49.	Identified Tr. 819 Offered Tr. 820 Admitted Tr. 820
33:	Statement concerning Item 16. Amount claimed $89,370.98.	Identified Tr. 820 Offered Tr. 937 Admitted Tr. 937
34:	Rental Schedule A.G.C. contractor's equipment. On the title page it is stated "This is *not* a rental schedule."	Identified Tr. 829 Offered Tr. 919 Admitted Tr. 919
35:	Compilation of rental rates Associated Equipment Distributors.	Identified Tr. 829 Offered Tr. 922 Admitted Tr. 922
36:	Statement of telephone expenses, Item 5. Amount claimed $625.86.	Identified Tr. ..... Offered Tr. ..... Admitted Tr. 1049
37:	Statement concerning Item 15 "Maintenance of General Electric Company Offices." Amount claimed $531.76.	Identified Tr. ..... Offered Tr. ..... Admitted Tr. 1049

Pl. Ex. 38:	Statement relative to Item 17 "Status Quo Transportation and Isolation Pay." Amount claimed $6,432.64.	Identifie Tr. ..... Offered Tr. ..... Admitte Tr. 104
Pl. Ex. 39:	Statement concerning Item 4 "Director of Labor Relations Costs." Amount claimed $537.75.	Identifi Tr. ..... Offere Tr. ..... Admitte Tr. 104
Pl. Ex. 40:	Voucher for Telephone Bills.	Identifi Tr. .....
Pl. Ex. 41:	Voucher for Telephone Bills.	Offere Tr. ....
Pl. Ex. 42:	Voucher for Telephone Bills.	
Pl. Ex. 43:	Voucher for Telephone Bills.	
Pl. Ex. 44:	Voucher for: Area Telephone.	Admitt Tr. 10
Pl. Ex. 45:	Statement of extra cost due to strike, office rent, furnishings ,etc. Item 2; amount claimed $1,168.38.	Identif Tr. 10 Offere Tr. 10 Admitt Tr. 10
Pl. Ex. 46:	Statement of Telephone Expense, Item 5. Amount claimed $633.46.	Identif Tr. ... Offere Tr. ... Admit Tr. 10

47:	Statement of Services of Allen, DeGarmo & Leedy, Item 6, in the amount of $750.00.	Identified Tr. ..... Offered Tr. ..... Admitted Tr. 1049
48:	Statement concerning Item 10 "Interest on Investment," claimed in the amount of $1,804.68.	Identified Tr. ..... Offered Tr. ..... Admitted Tr. 1049
49:	Revised list of plaintiff's claims as made at the trial, amounting to $182,515.77, which includes loss of profits in the amount of $16,592.24.	Identified Tr. 937 Offered Tr. 1031 Admitted Tr. 1031
50:	Photostatic copy of letter dated April 27, 1956, from Allen, DeGarmo & Leedy to Teamsters' Local 839 and Engineers' Local 370.	Identified Tr. ..... Offered Tr. ..... Admitted Tr. 1049
51:	Morrison-Knudsen Administrative Bulletin re Equipment Management Procedure.	Identified Tr. 969 Offered Tr. 971 Admitted Tr. 971
52:	Morrison-Knudsen Statement of Profit and Loss for year 1957.	Identified Tr. 998 Offered Tr. 1004 Admitted Tr. 1004

Pl. Ex. 53:	Statement concerning Item 12 "General Administrative Expense." Amount shown on this statement is $17,475.00 as contrasted with $19,257.00 as shown on final claim, Plaintiff's Exhibit 49.	Identifie Tr. 102 Offered Tr. 102 Admitte Tr. 102
Pl. Ex. 54:	Computation of Excess Labor cost due to Strike. Amount shown $41,297.86.	Identifie Tr. 102 Offered Tr. 102 Admitte Tr. 102
Pl. Ex. 55:	Statement of Services of Allen, DeGarmo & Leedy with bill attached. This statement is identical with Exhibit 47.	Identifie Tr. ..... Offered Tr. ..... Admitte Tr. 104
Def. Ex. 56:	Audit of Morris, Lee & Company made for defendant unions.	Identifie Tr. 105 Offered Tr. 105 Admitte Tr. 105